THE

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BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.,

OF LINCOLN'S INN,

ASSISTED BY

O. A. SAUNDERS, (EQUITY CASES). J. G. PEASE, AND ARTHUR B. CANE, (COMMON LAW CASES).

ALL OF THE INNER TEMPLE.

VOL. LXXXV.

1849—1851.

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PREFACE TO VOL. LXXXV.

Shallcross v. *Wright*, p. 165, exhibits an unusual kind of liability in quasi-contract, as we now say. A man dies in a friend's house of an infectious disease. Under medical advice the house is disinfected and the furniture of the sick-room destroyed. The dead man's estate is liable for the value of the property destroyed and the other incidental expenses, and a reasonable payment in that behalf is properly allowable in the executor's account. It might be an interesting exercise for a student in a jurisdiction where common-law pleading is still in force to draw the declaration that would be required in an action against the executor if he refused to pay.

At p. 227 that very learned and careful Judge Vice-Chancellor Wigram is reported to have used a construction after the fashion rather common in Thucydides, perfectly clear as to the sense, but defying grammatical analysis.

In the cases of *Wadsworth* v. *Queen of Spain* and *De Haber* v. *Queen of Portugal*, pp. 398 *sqq.*, which were disposed of together, the Court of Queen's Bench decided that the immunity of a foreign Sovereign from being sued in our municipal Courts extends to the protection of his property in England from any process available, among subjects, against the property of third parties, such as foreign attachment under the custom of London. The Queen of Spain, however, had to go without remedy for her name being abominably defaced by some illiterate clerk in the Mayor's Court. At p. 426 reference is made by the Court to a story in "Selden's Table Talk" of the King of Spain having been outlawed in Westminster Hall: the page in Singer's edition, by the way, is not 108 as cited in the report

but 180. We may observe that under the same heading of "Law" and the following one "Law of Nature" one or two other statements are ascribed to Selden which seem to represent the misunderstanding or treacherous memory of an unlearned narrator rather than anything that Selden can really have said even offhand. That a judgment of the King's Bench "binds no body but whom the case concerns" was no more true, and hardly more plausible, in the middle of the seventeenth century than it would be now.

Lord Campbell's duly reported opinion about the value of legal authorities is of more importance than unverified recollections of Selden's talk, although Selden was the much greater lawyer: but when we read in Lord Campbell's judgment in *Doe* v. *Rusham*, p. 653, that our Courts treat an Irish judgment with "the same deference . . . as if it had been pronounced in Westminster Hall," the statement seems rather wide at first sight. It is justified when we reflect that so long as we had three independent Superior Courts of common law they did not hold themselves positively bound to follow one another's opinions. In this case, in fact, the Court of Queen's Bench, having carefully considered a decision of the Irish Court of Exchequer admitted to be in point, unanimously differed from it, as at that time they would have been free to differ with the Court of Exchequer here. Another *dictum* of Lord Campbell's at p. 467 is to the effect that Courts of common law take judicial notice of the doctrines of equity as being part of the law of the land, though it is otherwise as to practice. This is no longer of any other than historical interest in England. The proposition appears to have been quite sound in 1851; it might need a somewhat minute research to satisfy oneself as to the time when it became so.

Sievewright v. *Archibald*, p. 353, is a very troublesome case as to the effect of brokers' bought and sold notes as a memorandum of a contract under s. 17 of the Statute of Frauds.

Cort v. *Ambergate Ry. Co.*, p. 369, is one of the line of decisions which led up to the doctrine of what is now called "breach by anticipation." The great authority of Baron Parke frowned upon this new opinion at its birth, but it is now settled law in England, and, we believe, generally accepted in other common law jurisdictions, that a total repudiation of a contract—or conduct manifestly showing that intention—even before the time for performance may be treated at the promisee's option as an immediate breach.

Mosley v. *Hide*, p. 344, is a profitable conveyancing case. If a vendor has agreed in the contract or conditions of sale that certain named parties will join in the conveyance, he is taken to affirm that by so doing they can make a good title; and if, by reason of facts known to the vendor and not to the purchaser, their joinder will not make a good title, the purchaser is not precluded from objecting to the title when he finds that the proposed form of conveyance will be of no substantial value. The justice of the decision is obvious, which perhaps is more than can be said for all of the rules applicable to the relations between vendor and purchaser.

F. P.

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OF THE

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1849—1851.

(12 & 13 Vict.—14 & 15 Vict.)

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Note.—Where the reference is to a mere note of a case reproduced elsewhere in the Revised Reports, or omitted for special reasons, the names of the parties are printed in italics.

NOTE.

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The Revised Reports.

VOL. LXXXV.

CHANCERY.

BRIDSON *v.* BENECKE (1).

(12 Beav. 1—7; S. C. 13 L. T. 277.)

1849.
Feb. 9.
April 16.

Rolls Court.
Lord LANGDALE, M.R.

[1]

A special injunction, on notice, to prevent the infringement of a patent refused, on the ground of delay, notwithstanding the COURT had a strong impression in favour of the plaintiff's right.

An injunction was refused, and the plaintiff put to establish his legal right. He was successful on the trial, but the defendants tendered a bill of exceptions. An injunction was granted, under the circumstances, before the bill of exceptions had been disposed of.

THIS suit was instituted to restrain the infringement of a patent, granted on the 26th of May, 1836, for stretching, drying, and finishing wove fabrics. The patent was the same as that in question in *Bridson* v. *M'Alpine* (2), in which case, the plaintiff obtained a verdict, and the CHIEF JUSTICE had certified, under the 5 & 6 Will. IV. c. 83, s. 3, that the validity of the patent had come in question. The defendant in that case tendered a bill of exceptions, on which, the Exchequer Chamber, upon the 16th of June, 1846, had determined in favour *of Bridson; and on the 29th of June following, an injunction was granted by this Court against M'Alpine.

[*2]

The defendants in the present case had procured another patent to be granted to Phillips, their manager, which they used in their manufactory. The plaintiffs insisted this was an evasive imitation of their patent.

(1) *Bovill* v. *Crate* (1865) L. R. 1 Eq. 388, 390; *Bovill* v. *Goodier* (1866) L. R. 2 Eq. 195, 35 L. J. Ch. 432, 12 Jur. (N. S.) 404.

(2) 68 R. R. 75 (8 Beav. 229).

BRIDSON v. BENECKE.

The plaintiffs discovered the alleged infringement in January, 1848. In April, 1848, they gave notice to the defendants to desist, but they did not file their bill until the 30th of December following. On the 15th of January, 1849, they gave notice of motion for an injunction to restrain the defendants from using their machine.

Mr. Turner and *Mr. J. J. H. Humphrys*, in support of the motion, relied on the long enjoyment, the establishment of the validity of the patent in the case of *Bridson* v. *M'Alpine*, and on the affidavits in support of the application, which, they argued, clearly showed the validity of the patent and the infringement by the defendants.

Mr. Roupell, *Mr. Cole*, and *Mr. T. Webster*, *contrà*, contested the validity of the plaintiffs' patent, and argued, that the question in the present case differed from that in *Bridson* v. *M'Alpine*, the decision in which was not binding on the present defendants. They also urged, that, after the great delay, the plaintiffs were not entitled to an injunction until they had first established their legal right.

Mr. Turner, in reply.

[*Hill* v. *Thompson* (1), *Bloxam* v. *Elsee* (2), *Spottiswoode* v. *Clarke* (3), *Bacon* v. *Spottiswoode* (4), *Bacon* v. *Jones* (5), *Collard* v. *Allison* (6), *Lewis* v. *Chapman* (7), and many other cases, were cited.]

[3] THE MASTER OF THE ROLLS:

Having regard to the length of the enjoyment and to the decision in *Bridson* v. *M'Alpine*, I should, if this matter had been brought forward without any delay, have granted the injunction, at the same time putting the parties on the terms of going to a speedy trial. And, without saying any thing which might prejudice the rights of the parties in another place, it would then have been right for me to go, at length, into the reasons which brought me to that conclusion; but I own I feel very great difficulty from the delay in this case. I think that a party coming for the assistance of this Court to protect a legal right, not absolutely established, against the party who is alleged to have infringed it, ought to come at an early period. I do not say, at the earliest possible period, because that would be

(1) 17 R. R. 156 (3 Mer. 622).
(2) 30 R. R. 275 (6 B. & C. 169).
(3) 78 R. R. 63 (2 Ph. 154).
(4) 49 R. R. 390 (1 Beav. 382).
(5) 48 R. R. 143 (4 My. & Cr. 433).
(6) 48 R. R. 161 (4 My. & Cr. 487).
(7) 52 R. R. 63 (3 Beav. 133).

putting an application for an injunction on notice, where all parties *have an opportunity of being heard, in the same condition as an injunction *ex parte*, which it would not be expedient to do. The rule of this Court is very strict, that you must apply in proper time. [*4]

Mr. Bridson was first informed of the proceedings of the defendants in January, 1848, and he had then an inspection of the machine. He very soon saw, that the defendants were infringing his patent; and in April, he gave distinct notice that he should proceed to establish his right against them. He then put the defendants on their guard, and he was, at that time, so disposed to proceed actively, that he actually got a bill prepared before the month of May; but, for some reason or other, he abstained from adopting any proceedings whatever till the month of December. Now, if an action had been brought and diligently prosecuted, it might have been tried long before this time, and an action may still be tried within a very limited time. I think that I ought not to grant the injunction, though my impression is, that if this application had been made earlier, I should (upon the evidence now before me) have been disposed to grant the injunction, notwithstanding the cases cited, showing the danger of granting injunctions when a legal right has not been absolutely ascertained. If the plaintiffs endeavour to procure an early trial, and difficulties are interposed by the defendants, I must give the plaintiff leave to revive this motion; and, holding the impression I now do, delay on the part of the defendants will then induce me to grant this injunction.

An action was accordingly brought (*Magnall* v. *Benecke*), which was tried before Mr. Justice Coleridge and a special jury on the 28th of March, 1849, when the *jury found in favour of the patent. [*5] The defendants, however, tendered a bill of exceptions to the Judge's directions to the jury, which had not yet been disposed of.

Mr. Turner and *Mr. J. J. H. Humphrys* renewed their motion for the injunction, contending, that as the plaintiffs were in possession of the verdict, backed by the opinion of the Judge, there was sufficient, after the strong intimation of opinion expressed by this Court on the former occasion, to induce the Court to protect the plaintiffs in the enjoyment of their patent. *April* 16.

Mr. Roupell, *Mr. Cole*, and *Mr. T. Webster*, *contrà*, argued, that the plaintiffs, not having as yet obtained judgment in their

BRIDSON v. BENECKE.

favour, were not entitled to an injunction: *Bridson* v. *M'Alpine* (1). That the state of the case had not been materially altered since the last motion; and, as the defendants' trade would be stopped by the injunction, without the power of recompensing the defendants, if they ultimately were found right, the Court, considering the balance of inconvenience, ought not to interfere pending the bill of exceptions, which raised substantial objections to the verdict.

THE MASTER OF THE ROLLS:

No argument was necessary to establish that a verdict is not a judgment, and that a bill of exceptions may possibly prevent the verdict from ever becoming a judgment. That, I think, would be admitted. Thinking, as I do, on the one hand, that this Court is not absolutely bound by the verdict, and thinking, on the other hand, that this Court ought not to disregard altogether a verdict [*6] *which has been given after a careful trial, the result is, that this Court must act according to the circumstances appearing in each particular case.

The question really is, whether, in this case, and having regard to the manner in which it has been brought forward, I ought, at this time, to grant the interlocutory injunction. I think I ought; and my opinion is grounded upon these reasons: first, there has been a long enjoyment, which I consider a matter of very considerable importance; secondly, there is the decision in the case of *Bridson* v. *M'Alpine* as to some points; and, so far as the same points were raised in both cases, I consider *Bridson* v. *M'Alpine* to be an authority, but not further. I do not think that the defendants in this case are bound by *M'Alpine's* case, as to any matter which was not strictly brought under the judgment of the Court, in such a manner as to constitute it an authority like any other authority in the books. I cannot concur with the argument, that, because the points might have been raised in *M'Alpine's* case, I am therefore to consider the parties in this case are in any way bound by that. I consider it is an authority as to points decided in it, and which the defendants in this case have endeavoured to take advantage of.

Thirdly, we have the evidence brought before me on the former occasion; and I cannot forget, that I had then a very strong impression that the merits were in favour of the plaintiffs. Finding that impression strongly corroborated by what took place at the trial, upon a careful examination of the witnesses and the summing

(1) 68 R. R. 75 (8 Beav. 229).

up, and having regard to the opinion of the learned Judge, I need not say, that my impression is greatly strengthened. The question remains, whether I can, on the mere ground that a bill of exceptions has *been tendered to the Judge, refuse to the plaintiffs the benefit of all these circumstances. [*7]

I am perfectly aware that the jurisdiction of this Court does necessarily appear to be somewhat anomalous. The Court acts in aid of a legal right, and yet, as I have already observed, there are many cases in which the Court is to such an extent satisfied that the legal right exists, that it will often give the plaintiff the benefit of the jurisdiction, at the very same time that it thinks, for greater satisfaction, that there ought to be a subsequent trial. Cases of that kind have frequently occurred where the Court is not quite satisfied, though the usual course is, to let there be a trial, and after that trial has taken place, and the verdict has been obtained, the Court will then determine, with reference to the circumstances, whether an injunction ought or not, at that time, to be granted.

Undoubtedly, if there could be a final adjudication of this matter at law in the course of a few weeks, I might possibly be of opinion that the injury done to one party by delay would be trifling in comparison to the positive injury done to the other. But I am not satisfied that it would take so short a time to bring this to a final conclusion, by settling all those points of law. On the contrary, I think that, having regard to the circumstances of this case, much more injury would be done to the plaintiffs by delaying this injunction, than to the defendants by granting it, even if it should turn out afterwards, on the decision of the court of law, to be erroneous. Nobody can shut his eyes to the danger there is of committing error in cases of this kind: the risk of error is perhaps greater in these cases than in most others; but I think I ought, under the circumstances of this case, to grant the injunction.

THE ATTORNEY-GENERAL *v.* THE CORPORATION OF LONDON.

1849.
Feb. 21, 22, 24, 26.
April 4.

(12 Beav. 8—28; affd. 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L. J. Ch. 314; 14 Jur. 205.)

Rolls Court.

[AFFIRMED on appeal, as reported in 2 Mac. & G. 247.]

Lord LANGDALE, M.R.

[8]

1848.
March 7 9
July 8.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
July 8.

Lord COTTENHAM, L.C.

[29]

SKIPPER *v.* KING (1).

(12 Beav. 29—34; S. C. 12 Jur. 209; 11 L. T. 81; affd. 12 Jur. 570.)

A sum was vested in trustees, upon trust, declared by deed. The deed recited an intention to make some provision for A. and her children, and declared, that the trustees should hold the fund for A. for life, and upon her death or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A. *then* living, the said stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A., and if not, immediately on her death or making any charge." And if there should be two or more *such* children, then the stock to be transferred amongst such children, in equal shares, at the age of twenty-one, if A. should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement, and accruer. There were several children; one attained twenty-one, and died in the life of A.; Held, that her representatives did not participate in the fund.

IN 1816, David King executed a voluntary deed, which was made between him and three trustees, whereby, after reciting that for making some provision for his two daughters, Mrs. Skipper and Mrs. Hawkins, and for their respective children, he had transferred a sum of 10,200*l.* Navy Five per Cents. into the names of three trustees, it was declared, that the trustees should stand possessed of that sum, in trust for David King for life, and after his death, as to 6,000*l.*, in trust for Mrs. Skipper for life, without power of anticipation; and from and immediately after her decease, or doing any act to incumber her interest, that the trustees should stand possessed of it, "upon trust, if there shall be but one child of the said Elizabeth Skipper then living, the said stock to be an interest vested in such child being a son or daughter at his or her age of twenty-one years, and to be assigned, transferred, or paid to him or her accordingly, if such age shall happen after the decease of the said Elizabeth Skipper, and if not, then immediately after her decease," or making any charge as aforesaid; "and if there shall be two or more such children, then the said stock to be assigned, transferred, or the produce thereof paid, to and amongst such two or more children, in equal shares and proportions, at their age *or respective ages of twenty-one years, if the said Elizabeth Skipper shall be then dead, or have incumbered the same; but if not, then immediately after her decease, or having made such incumbrance.

[*30]

(1) *Jeyes* v. *Savage* (1875) L. R. 10 Ch. 555, 44 L. J. Ch. 706, 33 L. T. 139; *Deighton's Settled Estates* (1876) 2 Ch. D. 783, 45 L. J. Ch. 825, 34 L. T. 81.

"Provided always, that if there shall be more than one child, for whom shares or proportions are intended to be hereby provided, as aforesaid, and any of them shall depart this life under the age of twenty-one years, then the share intended to be hereby provided for such child so dying, or so much thereof as shall not have been raised and paid or applied for the preferment or advancement in the world of such child or children, in pursuance of the power and authority hereinafter for that purpose contained, shall go, enure and belong to the survivor or survivors and others and other of such children, and shall vest in and be assigned, transferred, and paid to him, her, or them (if more than one), in equal shares and proportions, at such age, and in such and the same manner as is hereinbefore declared of or concerning his, her, or their original share or shares.

"And in case more than one of such children shall depart this life under the age of twenty-one years, then, and so often as it shall so happen, all and every the surviving or accruing share or shares of such child or children so dying of and in the said stock to be purchased with the said stock, or of or in such part thereof as shall not have been raised and paid or applied for his, her, or their preferment or advancement in the world, by virtue and in pursuance of the power and authority hereinafter mentioned, shall again, from time to time, accrue or go to the survivors or survivor and others and other of the said children, and shall vest in and be assignable, transferable, and payable, and be actually assigned, transferred, and paid to him, her, or *them respectively at the ages [*31] aforesaid, and in the same manner as is hereinbefore declared touching and concerning his, her, or their original part or share, or parts or shares, of and in the said stock."

The deed contained a proviso, empowering the trustees, after the death of Mrs. Skipper, or during her life, if she should so direct, "to levy and raise any part or parts of the portion or portions intended to be hereby provided for such children, as aforesaid, not exceeding in the whole, for any one child, one third part or share of his, her, or their expectant portion or portions;" and for applying the money for the advancement "of such child," notwithstanding the portion or portions of such child or children should not then have been vested or payable.

And it empowered the trustees, after the decease of Mrs. Skipper, out of the interest, to apply for the maintenance "of such child or children," in the meantime, and until his, her, or their portion or

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portions should become payable, such yearly sum as the trustees should think fit.

And in case there should be no child of the said Elizabeth Skipper, who should, by virtue of or under the trusts thereinbefore declared, become entitled to the said stock or sum of 6,000*l.*, then the trustees were, "after the decease of the said Elizabeth Skipper, and such default and failure of issue as aforesaid," to stand possessed of the said stock, in trust for such person as Elizabeth Skipper should appoint, and in default of such appointment, upon trust for the next of kin of the said Elizabeth Skipper, according to the Statute of Distribution of Intestate's Estates.

[32] Mrs. Skipper had six children,—namely, Louisa Jane (the wife of Mr. Baylis) and five others.

Louisa Jane attained twenty-one, and died in November, 1828, and her husband took out administration to her. He became bankrupt, and his interest vested in his assignees.

In 1845, Mrs. Skipper, the tenant for life, died, leaving five children surviving her; and the question in the cause was, whether Mrs. Baylis, who had attained twenty-one, but had died in the life of the tenant for life, took a vested interest in the fund.

Mr. Kindersley and *Mr. Phillips*, for the plaintiffs, argued, that the death of the mother was the period of vesting, and that those children who died in her lifetime did not take vested interests, although they might have attained twenty-one. * * *

Mr. Turner and *Mr. Martelli*, for parties in the same interest. * * *

[33] *Mr. Roupell* and *Mr. Nalder*, for the assignees of Mr. Baylis, [cited *Woodcock* v. *The Duke of Dorset* (1) and *Powis* v. *Burdett* (2), and insisted that Mrs. Baylis took a vested interest].

[34] *Mr. Amphlett* for the trustees.

Mr. Kindersley, in reply.

[*Howgrave* v. *Cartier* (3), *Hotchkin* v. *Humfrey* (4), *Fitzgerald* v. v. *Field* (5), *Wordsworth* v. *Wood* (6), *Torres* v. *Franco* (7), and other cases, were also cited.]

(1) 13 R. R. 145, *n.* (3 Br. C. C. 569).
(2) 7 R. R. 259 (9 Ves. 428). And see *Perfect* v. *Lord Curzon*, 21 R. R. 331 (5 Madd. 442).
(3) 13 R. R. 142 (3 V. & B. 79).
(4) 17 R. R. 188 (2 Madd. 65).
(5) 25 R. R. 97 (1 Russ. 416).
(6) 48 R. R. 191 (2 Beav. 25; 4 My. & Cr. 641; 1 H. L. C. 129).
(7) 32 R. R. 308 (1 Russ. & My. 649).

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The MASTER OF THE ROLLS commented at length on the terms of the deed, and considered that the words "such children" must refer to the former antecedent expression, child "then living," and mean children living at the death, and that this construction was not varied by the subsequent provisions or by the gift over. He was therefore of opinion that Mrs. Baylis, who attained twenty-one, and died in the life of her mother, acquired no interest in the trust fund.

1848. *July* 8.

[12 Jur. 570]

[The LORD CHANCELLOR affirmed the decision of the MASTER OF THE ROLLS. No report of his judgment has been found.]

THE ATTORNEY-GENERAL *v.* TUFNELL.

1849. *March* 15.

(12 Beav. 35—49.)

Rolls Court. Lord LANGDALE, M.R.

[35]

A schoolmaster retained all the rents of a charity estate, after making small fixed payments to the alms-people. At the hearing, the COURT held that he was not entitled to do so, and made a decree, referring it to the Master to enquire what the charity estate and property consisted of, and to settle a proper scheme for the management of the estates and property, and "for the application of the future rents and profits of the school." No account was directed against the schoolmaster: Held, that "future rents" meant all those subsequent to the decree, and the schoolmaster having died before the scheme had been settled, the COURT, on a supplemental information, directed an account against his personal representatives of the rents received subsequent to the decree.

THIS was a supplemental information filed on the death of a defendant, to effect the objects of the information in *The Brentwood School* case (1).

The circumstances are shortly as follows: In 1557, Sir Anthony Browne obtained from the Crown a license to found and endow a grammar school at Brentwood, consisting of a master and two guardians, who were created a corporation. The patronage was reserved to the founder and his heirs, who had power to make orders and constitutions.

In 1558, Sir A. Browne and wife conveyed lands at Chigwell to the corporation, for the maintenance of the school.

In 1565, Sir A. Browne, by his will, devised to the corporation a residence for the master of the school, and the parsonage of Dagenham, to the intent that they should find five poor folks in Southweald, to be named by him and wife, and after their deaths, by the owners of the manor of Southweald.

(1) *The Attorney-General* v. *The Master, &c. of Brentwood School*, 37 R. R. 326; and see 36 R. R. 334 (1 My. & K. 376; 3 B. & Ad. 59).

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In 1569, a suit was instituted in this Court, by some inhabitants of Southweald against Wystan Browne, the *heir of Sir Anthony,
[*36] to establish the grant and devise. The heir, at first, made a hostile defence, but, in 1570, a decree was made, by consent, directing a conveyance by the heir to the corporation, and that statutes, ordinances, and institutions of and for the school and poor people should be made (none having hitherto been made) by the Bishop of London, the Dean of St. Paul's, and by Wystan Browne and his heirs.

In 1662, a body of statutes were accordingly made, under one of which, the schoolmaster was authorised to retain to his own use all the rents and profits of the lands of the corporation, otherwise than such as were thereby otherwise appointed, and the master was yearly to give to each of the poor alms-people, a robe of the value of 10*s.*, and a stipend of 40*s.* yearly. This stipend, in 1803, had been increased to 10*l.* annually.

The right of patronage had become vested in Christopher Thomas Tower; and Charles Tower, who had become the master, received the whole income, both of Chigwell and Dagenham, paying thereout the fixed stipend to the alms-people.

In 1825, an information had been filed by the *Attorney-General* against the corporation, the patron, and master, alleging the income of Dagenham to amount to 1,000*l.* a year, and Chigwell 400*l.* a year, of which about 300*l.* had been applied for the purposes of the charity, and the remainder retained by the master: it prayed the establishment of the charity, and to have the income of Dagenham, or a proper portion, applied to the support of the alms-people or *cy-près*. Charles Tower died in 1825, and William Tower, his successor, was brought before the Court by supplemental information.

[37] At the hearing in 1833, Sir JOHN LEACH was of opinion that the decree did not authorise any statutes contrary to the intention of Sir A. Browne; and that it was contrary to his intention thatany part of the revenue of Dagenham should be applied for the benefit of the schoolmaster, and that even if the statutes could be considered in full force, they could not protect the master in the enjoyment of his present large sinecure income.

By the decree, it was ordered, that it should be referred to the Master in rotation to enquire and state to the Court, of what particulars the estates and property given and devised for the benefit and support of the grammar school by Sir Anthony Browne, and also of what particulars the property given and devised for the support

of the almshouse charity in Southweald consisted. And it was thereby ordered, that the Master should settle and approve of a proper scheme for the management of the said estates and property respectively, and for the application of the future rents and profits thereof, and for the proper conduct and regulation of the said school. And it was thereby ordered that the Master should state such scheme, with his opinion thereon, to the Court, the Court reserving to itself the consideration whether, for the purposes of effectuating such scheme, it might or not be necessary to apply for the aid of Parliament.

The defendant W. Tower appealed from this decision, and the cause was heard by Lord BROUGHAM on the 27th of June and 1st of July, 1834. He postponed his judgment, to give the parties an opportunity of compromising, to be confirmed, if necessary, by Act of Parliament, and he left office (22nd of November, 1834), without having delivered any judgment.

It was stated, in the present answer, that the appeal was again, [38] on the 24th of March, 1838, reheard by Lord COTTENHAM, who, on the 12th of February, 1836, suggested, that the parties should take the judgment of Lord BROUGHAM thereon; and, accordingly, Lord BROUGHAM having consented to determine the matter of the said appeal, the solicitor for the then *Attorney-General*, and the solicitor for the defendants C. T. Tower and William Tower attended before his Lordship on the 24th of March, 1838, when his Lordship directed that each party should draw up and submit to him a statement and proposal in writing; and it was then arranged between the said solicitors, that each of them should, in the first instance, send his draft statement and proposal to the other, in order that the two statements should correspond as far as the parties could agree.

That within two days after the said attendance before Lord BROUGHAM, the solicitor for the said C. T. Tower and William Tower sent a draft of a statement and proposal on their behalf to the solicitor for the then *Attorney-General*, but that the said draft had never been returned, nor had any statement or proposal on behalf of the *Attorney-General* (although promised) been sent to the solicitor for the said C. T. Tower and William Tower.

The Master made a separate report, finding the charity property, whereby it appeared that the rental of Chigwell was 283*l.*, and of Dagenham 1,036*l.*; but he had not approved of any scheme. Before the report had been confirmed, and in August, 1847, William

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Tower, the master, died, and this supplemental information was filed in January, 1848 (by the *Attorney-General* without a relator), against his representative, the patron, corporation, and Tufnell, the present master, stating the proceedings up to the decree, and

[*39] that the *schoolmaster had retained the whole rents up to his death, and the report, and it sought to make the representative of William Tower answerable for the rents of Dagenham received by him.

The personal representative of William Tower, by her answer, submitted, that no account of the sums received by the said William Tower on account of the income of the said estates having been prayed for by the original and supplemental informations, and the decree made on the hearing of the said original and supplemental informations containing no direction for the taking of such account against the said William Tower, no such accounts as were in the said information of revivor and supplement prayed for against the estate of the said William Tower ought now to be directed to be taken.

The supplemental information now came on for hearing.

Sir J. Romilly (*Solicitor-General*), *Mr. Turner*, and *Mr. Blunt*, in support of the information.

Mr. Lloyd and *Mr. Fane*, for the representatives of the late schoolmaster:

The decree in the original suit has directed no account whatever against William Tower, and contains no declaration of right against him. This supplemental information, which seeks so materially to alter the rights of the parties under that decree, is irregular. It is, in its nature, a bill of review, and, being filed without leave, ought to be dismissed: *Hodson* v. *Ball* (1). * * *

[40] *Mr. Walpole* and *Mr. Lovat*, for the patron.

Mr. Roupell, for the present schoolmaster.

Sir J. Romilly, in reply.

THE MASTER OF THE ROLLS:

My only difficulty is about the form. I cannot say that I have the smallest doubt that that word "future" means future to the decree, and nothing else; and that is the whole question. The

(1) 65 R. R. 366 (1 Ph. 177).

question is on the mere matter of form, whether there ought to be a decree for an account now, and of that I doubt; but if this were on further directions, with all I have heard of it to-day, I should declare my opinion that the word "future" meant future to the decree; and I think it is nothing less than absurd to suppose that any person could put that word "future" into the decree with any other intention than that it meant future to that time. Past future or some other future seems to be out of the question. But whether the *Attorney-General* is entitled to any account now, I do not know. If my construction is wrong it can be easily altered in the proper way, and if the decree is wrong in using the word "future," as future from some future time, that can be altered, too, on rehearing. As to the allowances, the *Attorney-General* will allow every thing properly expended. I shall be surprised if there is any difficulty about it.

The *Solicitor-General:*

Mr. Tower would be allowed every thing paid in that respect.

THE MASTER OF THE ROLLS:

I think that, as against Mr. Tower, it is a hard case. In addition to the hardship imposed on him by the original decree, there are these two circumstances: *He has endeavoured to procure an [*41] alteration of the decree by appeal, and has been disappointed, apparently, not from the want of any effort on his own part to obtain it. I think that is much to be regretted; I think it deserving the serious consideration of the *Attorney-General* in what way any decree or order should be prosecuted against him, and I feel perfect confidence that nothing will be done but what is right and just in such a case.

What is the claim under this decree? At the time the decree was pronounced, the MASTER OF THE ROLLS declared his opinion that, under the circumstances, Mr. William Tower was not entitled to apply to his own use the whole revenues of these charities. It was very distinctly declared, but in consequence of the hardship of his situation, it was considered that he ought not to be called on for any past account; and, therefore, up to the time of the hearing he was exonerated from all account. Accordingly, the decree contains no direction to take any account; but the same decree refers it to the Master to approve of a scheme for the management of the estates and property respectively, and for the application

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of the future rents and profits thereof, and for the proper conduct and regulation of the said school.

I confess I cannot bring myself to believe, that any one can seriously suppose, that when there was to be a scheme for the application of the "future rents," it did not mean future with respect to the time when the Judge was pronouncing his decision. I cannot believe that it could have been meant, that there should have been a reference to the Master to approve of a scheme for the management of this property, and the application of the future rents after that scheme should have been settled, and nothing done [*42] as to the rents in *the mean time. I consider that this does mean the application of the future rents received with reference to the time of the decree; and, though it is not expressly said, yet there is a manifest implication, that the whole of the future rents were to be subject to the charitable trusts.

This gentleman, being discontented with the decree, though he has obtained a rehearing, has not, unfortunately, obtained a decision. It is greatly to be regretted, but the decree now stands.

Unfortunately, years have passed, and these matters have not come to a really practical conclusion before the Master. The whole rents have been received by this gentleman, and applied, as it is now said, in some respects at least, for charitable purposes, such as met with the approbation of the Judge at the time the decree was made, and with the consent of her Majesty's *Attorney-General*, by whom this decree was prosecuted. If he has not fair allowance made for every thing of that kind, I think he will have the means of redress in this Court. I have not the least doubt that all fair allowances will be made.

I do not think the matter is perfectly clear; but, on the best consideration I can give the matter, I think the *Attorney-General* is entitled to have an account of these rents which have accrued due, and have been received since the date of the decree, making to the legal personal representative all proper allowances not only for the mere expenses of the estate in receiving the rents, but also for any charitable purposes, though not distinctly within the words of the original charitable foundation.

MITCHELL *v.* KOECKER.

(12 Beav. 44—45.)

1849.
March 21.

Rolls Court.
Lord LANGDALE M.R.

[44]

[A NOTE of this decision will be found at the end of the report of the suit on demurrer, taken from 11 Beav. 380: see 83 R. R. at p. 200.]

THE ATTORNEY-GENERAL *v.* REES (1).

(12 Beav. 50—55.)

1849.
April 30.

Rolls Court.
Lord LANGDALE M.R.

[50]

An answer may be verbally full, but technically insufficient, as where a defendant sets up his ignorance of facts as to which he has plainly the means of obtaining the information required.

The answer of persons engaged in working a coal mine which stated, that they could not, as to their belief or otherwise, set forth the mode of working, held insufficient; the COURT assuming, that they must have workmen under their control from whom such information might be derived, and which (2) the defendants were bound to afford.

BY this information, the Crown claimed, by Royal prerogative, the soil and mines under the sea shore of an estuary, or arm of the sea, called the Bury river, in Carmarthenshire. It alleged that the defendants had worked the coal mines under such shore, by means of a shaft in the adjoining lands.

The information prayed a declaration of the rights of the Crown: that the boundaries might be distinguished, and that the defendants might account for the coal improperly taken.

The sixth interrogatory required the defendants to set forth, according to their "knowledge, remembrance, information, and belief, whether they had not, by" means of the pit or shaft sunk in the land of the defendant William Chambers, or by means of some other and what shaft or pit &c., lately and when first, opened and worked veins or seams of coal and culm, or one of them, lying under the said sea shore belonging to her Majesty, and whether they had not raised and dug up large, or some and what quantities of coal or culm, from parts of the said veins or seams which lay *under the [*51] said sea shore between high and low water mark, and sold or disposed of the same for various large, or some and what, sums of money, or how otherwise.

The seven defendants put in an answer, whereby, in answer to the sixth interrogatory, they said, they did not know, and could not set forth as to their information, belief or otherwise, whether those

(1) *Bolckow* v. *Fisher* (1882) 10 Q. B. D. 161, 52 L. J. Q. B. 12, 47 L. T. 724; *Alliot* v. *Smith* [1895] 2 Ch. D. 111, 64 L. J. Ch. 684, 72 L. T. 789; *Rasbotham* v. *Shropshire Union Railways and Canal Co.* (1883) 24 Ch. D. 110, 53 L. J. Ch. 327, 48 L. T. 902.

(2) *Sic.*

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defendants had, "by means of the pit" &c. &c. (following the terms of the interrogatory.)

No exceptions were taken to this answer. The information was afterwards amended, and the extent of the title of the Crown to the sea shore was changed, and the meaning of the expression "the said sea shore" was varied. The sixth interrogatory was left unaltered, and the seventh interrogatory was struck out and replaced by another, which, amongst other things, asked as follows: "whether it is not true, that even now, a considerable portion of such workings lies under the sea shore, which is to the seaward of the present high water mark at ordinary neap tides."

To the 6th and 7th interrogatories in the amended bill the defendants answered as follows:

And defendants do not know, and cannot set forth, as to their belief or otherwise, whether or not defendants (who are members or partners of the Pool Colliery Company) have, by means of the pit or shaft sunk on the land of the defendant William Chambers, or by means of any other shaft or pit" &c., "lately, or at any time first, opened and worked the veins or seams of coal and culm, or any or either of them, alleged in said information to be lying under the sea shore, in said information stated to belong to her Majesty;

[*52] or *save as herein appears, whether or not they have raised and dug up large, or some and what, quantities of coal and culm from such parts of the veins or seams which are in said information stated to lie under the sea shore between high and low water mark, or sold or disposed of the same for various large, or some and what, sums of money, or how otherwise.

"And these defendants say, they do not know and cannot set forth, as to their belief or otherwise, whether or not it is also true that even now, a considerable portion of such workings as are alleged in the information to be carried on, lies under the sea shore which is to the seaward of the present high water mark, at ordinary neap tides."

The *Attorney-General*, insisting that these two interrogatories had not been answered, took exceptions to the answer; and the Master having over-ruled them, the case was brought before the Court, upon appeal from his judgment.

Sir J. Romilly (*Solicitor-General*) *Mr. Turner*, and *Mr. Maule* in support of the exceptions, argued, that the answer was insufficient; for the defendants, who had the power of obtaining the

information sought, could not be allowed to escape the obligation of giving a discovery, by the mere statement that they were ignorant. That they were bound to obtain from their servants and workmen, who were under their control, the information asked, and to answer upon "their information, as well as on their knowledge and belief." *Earl of Glengall* v. *Frazer* (1) and *Taylor* v. *Rundell* (2) were cited. A.-G. v. REES.

Mr. Malins and *Mr. Renshaw*, for the defendants, argued, that the informant, having taken no exception to the first answer as to the sixth interrogatory, could not now object to the sufficiency of the answer to it. * * * [53]

Sir John Romilly, in reply. * * *

THE MASTER OF THE ROLLS:

With regard to the first exception, the principle on which it must be decided is this: If a plaintiff makes a certain statement in his original bill, and founds an interrogatory on it, which is answered by the defendant, and the answer is acquiesced in and submitted to by the plaintiff, and afterwards, the plaintiff, by amendment, changes the antecedents or facts on which the statement and question are founded, I am of opinion *that the answer to that interrogatory, having been acquiesced in by the plaintiff, must afterwards be held to be sufficient. An interrogatory must be founded upon a preceding statement or allegation, which generally or very often depends on something antecedent. If the antecedent be changed ever so much, I apprehend that if the statement and the interrogatory remain unchanged, the former answer put in to it and acquiesced in by the plaintiff must be taken to be sufficient. [*54]

But although a plaintiff is not, under such circumstances, entitled to have a new answer to the old interrogatory, unless he specially intimates to the defendant in the amended bill that he requires a new answer, as might have been very easily done in this case, yet if the defendant, on his part, acquiesces in the new meaning of the relative expression contained in the statement and interrogatory, and admits himself under the obligation of putting in a new answer to it, and does so accordingly, you must take the matter altogether, and as if there had been no acquiescence on the part of the plaintiff in the sufficiency, the defendant himself not relying on it.

(1) 63 R. R. 37 (2 Hare, 101).
(2) 54 R. R. 227 (11 Sim. 391; Cr. & Ph. 104); 65 R. R. 372 (1 Ph. 222; 1 Y. & C. C. C. 128).

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The question then comes to this: whether the circumstances of this case are such, as to induce the Court to say, that the answer, though verbally a full and sufficient answer, is really and technically so. I do not find that these defendants say that they have been unable to get information from their workmen. They are required to answer "as to their knowledge, remembrance, information, and belief," yet they content themselves with saying, that they do not know, and cannot set forth as to their belief, or otherwise, &c. &c. I quite agree with *Mr. Malins* as to the ordinary effect of the words [*55] "belief or otherwise;" yet it is singular, that in a case where *the knowledge must naturally be derived from the persons employed by them, the defendants have thought fit to omit the expression "information." I do not recollect any case exactly like this; but one might very well conceive many cases, in which the Court would not be satisfied with such an answer, where, though it might be perfectly true that the defendants were ignorant of the facts, yet that they must, of necessity, have the information within their reach, and had only to ask for it.

These gentlemen are engaged in working a coal mine of considerable extent. They must, of necessity (I do not think the matter rests on conjecture), have workmen and other persons in their employ engaged in carrying on these works, and under their influence and control, from whom every information respecting the coal working might be obtained. The question then really is, whether, in such a case as this, it is necessary that the means of obtaining the information should be indicated by the answer, as was the case in both the authorities cited; or whether the means of information must not, necessarily, be presumed to be within the knowledge of the defendants? I think that this is a matter of clear presumption, for every man of ordinary understanding must know, that there must be persons from whom the information required might have been derived. I must presume that this mine is conducted in the ordinary way in which mines are conducted; and I cannot divest myself of the belief that these gentlemen have workmen and agents from whom they might, without difficulty, have got the information required.

For these reasons I think I must hold that these exceptions ought to be allowed.

THE ATTORNEY-GENERAL *v.* PILGRIM (1).

(12 Beav. 57—62; S. C. 13 L. T. 202; affd. 2 H. & Tw. 186.)

1849. *March* 12.

Rolls Court. Lord LANGDALE, M.R.

Affirmed on Appeal. 1850. *Feb.* 25. Lord COTTENHAM, L.C.

A lease of charity land for 999 years, subject to a fixed rent of 10*l.* and a covenant to lay out 300*l.* in building, was set aside after 150 years, and an allowance for the building refused.

An alienation of charity property may be valid, but the *onus* of proof lies on the alienee (2).

IN 1521, a freehold garden in Norwich, containing about half an acre, was devised to charitable uses for the benefit of the parish of St. Andrew's.

By an indenture dated in 1699, certain parties, described as trustees on behalf of the parish and the churchwardens, "by and with the consent and approbation of the parishioners of the said parish, in consideration that John Copping had undertaken to lay out the sum of 300*l.* in building upon the said premises," and in consideration of the yearly rent thereby reserved, demised "all that their orchard and garden ground, with the houses, edifices, and buildings thereupon built" &c. for the term of 1,000 years, at the yearly rent of 10*l.*, "for the use, benefit, and sustentation of the said parish." Copping thereby covenanted to build a house or houses upon the said premises, and expend about such building 300*l.*, and keep the same in repair during the term. [57]

The property had previously been let for 8*l.* per annum.

By mesne assignments, the lease became, in 1810, vested in Robberds, who sold the premises in different portions. He sold a part to Smith for the residue of the term, fixing and reserving 1*l.* as the apportioned part of the ground rent on the said premises. In 1830, Smith, in consideration of 200*l.*, assigned this part of the premises to the defendant Pilgrim for *the residue of the term of 1,000 years, subject to the apportioned rent of 1*l.* [*58]

This information, insisting that the lease of 1699 was improvident, prayed that it might be set aside as against the defendants. The information stated, that "within a few years, various messuages and buildings had been erected" on the charity estates, and it alleged, that the whole property was now worth nearly 200*l.* a year; but this fact was not proved.

The portion of the property possessed by Pilgrim consisted of a

(1) Cited, *In re Mason's Orphanage and L. & N. W. Ry. Co.* [1896] 1 Ch. 54, 60 (affd. *ib.* 596), 65 L. J. Ch. 439.

(2) But now see the Charitable Trusts Amendment Act, 1855, s. 29, which requires the consent of the Charity Commissioners to the sale or lease of property held as a charitable endowment.—O. A. S.

A.-G. v. PILGRIM.

pawnbroker's shop, let at a gross rent of 8*l.* 8*s.*, but producing 6*l.* clear on an average.

The value of the whole property, supposing it not to be built on, and let as a garden ground, was proved to be from 8*l.* to 9*l.* a year.

By his answer, Pilgrim said he purchased the lease *bonâ fide*, and with no other knowledge, belief, or suspicion that the said premises were part of the charity estate, than what was disclosed by the statement of the deed of 1699, in the abstract of title thereto delivered to him.

Mr. Turner and *Mr. Rogers*, in support of the information, [cited *A.-G.* v. *Brettingham* (1) and earlier cases to the like effect]:

[59] The defendant must be held to have notice of the facts appearing upon the lease which he purchased, and which show its invalidity: *Attorney-General* v. *Pargeter* (2).

Mr. Baggallay for the churchwardens and trustees.

Mr. Roupell and *Mr. Elmsley*, for Pilgrim:

First, notice of a lease being a lease of charity property does not carry with it notice of its invalidity. Secondly, a lease of charity property will not be set aside as of course, merely on account of the extent of the term granted, and there is no positive rule against alienation: *Attorney-General* v. *Warren* (3). In the case of *The Attorney-General* v. *Hungerford* (4), a lease of charity lands renewable for ever, at a fixed rent, was supported by the House of Lords. So in *The Attorney-General* v. *The South Sea Company* (5), a lease of charity property for 999 years was upheld by this Court, the arrangement appearing free from fraud, and for the benefit of the charity. Here the value of the land itself has not increased; but the increase is attributable to the outlay made on the faith of the lease. Thirdly, upon the face of this lease, it appears to have been granted, on full consideration, by the churchwardens, with the authority of the parishioners, who were the parties entitled to the benefit of it, and therefore it ought not to be set aside after such concurrence and long subsequent acquiescence. Sir JOHN LEACH, in a case somewhat similar, observed, it is not "the office of a court of equity, at the distance of more than two centuries, to undo

[*60] an arrangement *which was perfectly fair at the time between the

(1) 52 R. R. 46, 48 (3 Beav. 91, 95).
(2) 63 R. R. 41 (6 Beav. 150).
(3) 19 R. R. 74 (2 Swan. 291).
(4) 37 R. R. 145 (2 Cl. & Fin. 357; 8 Bligh, 437).
(5) 55 R. R. 137 (4 Beav. 453).

contracting parties, and was sanctioned with the full approbation of the executor of the founder, and has become unequal only from accidents arising out of the course of time:" *Attorney-General* v. *Pembroke Hall* (1).

Mr. Rogers, in reply, cited *Attorney-General* v. *Foord* (2), *The Churchwardens of Deptford* v. *Sketchley* (3), and 59 Geo. III. c. 12, s. 17.

THE MASTER OF THE ROLLS:

Having regard to the case of *The Attorney-General* v. *Green* (4), and to the subsequent cases, I think that this lease cannot be maintained. It is a lease of charity land for 999 years, at a fixed rent of 10*l*., with a covenant to lay out 300*l*. in building. That is really all there is in this case.

The law, as at present understood, allows the alienation of charity land, if made under circumstances which show that it is fairly made, and for the benefit of the charity. I cannot say that this case, on the face of it, is conclusive, but in the absence of any evidence from the party called upon to maintain the lease, I think that the conclusion to be drawn from the lease itself is such, as to justify the Court in saying, that this lease cannot be maintained. I have said, during the discussion, that there might be circumstances which would fully justify the alienation of charity property: I acted on that principle in the case of *The Attorney-General* v. *The South Sea Company* (5), and *am not aware that that decision has ever, in any way, been disturbed. I must again repeat, that the Court is ready to attend to circumstances; but they must be brought forward by the party who seeks to take advantage of them. If the defendant had even stated any circumstances which would have warranted an inquiry, I should have been disposed, in a case like this, to have directed one; but I find no such circumstances even alleged. It is the bare case of a lease of charity land for 999 years (which amounts to an alienation) at a fixed rent of 10*l*. There is a covenant to lay out 300*l*., but for whose benefit I profess I am, at this moment, totally unable to ascertain, considering that this was an alienation. I must therefore consider this a bad lease.

[*61]

It is said, that the Court ought to be influenced by the length of time which has elapsed since 1699. It would certainly be a very

(1) 53 R. R. 52 (2 Sim. & St. 441).
(2) 63 R. R. 79 (6 Beav. 288).
(3) 70 R. R. 527 (8 Q. B. 394).
(4) 6 Ves. 452. [See next page, footnote (2), and the later cases cited above on behalf of the *Attorney-General*.—O. A. S.]
(5) 55 R. R. 137 (4 Beav. 453).

A.-G. v. PILGRIM.

great mistake to suppose, that this Court does not attend to lapse of time, during which a great deal of important evidence must necessarily have perished. If there are indications, not of themselves altogether satisfactory, which tend to a certain presumption or conclusion, the Court, after a great length of time, will give a greater weight to those indications than it would in a modern transaction. But here there are no indications at all showing the validity of this transaction.

I should feel reluctant to dispose of this case without inquiry, if there were grounds for one; for nobody can feel more strongly than I do the great hardship there is on persons, who, having bought land, and innocently remained in possession for a length of time, are turned out of it, in consequence of a defect in the title which [*62] arose long ago. I feel greatly for persons in that situation, *and I have, over and over again, stated, that when such persons being informed of the nature of their title, come forward and offer to do, upon fair terms, that which justice to the charity requires them to do, I can never fail to take that matter seriously into consideration in determining the question of the costs of suit. But when, being informed of the circumstances, a party resists the claims of the charity to the utmost, and fails in the litigation, he must pay the costs which his own resistance has occasioned.

Mr. Roupell asked for an allowance in respect of the value of the building. He cited *The Attorney-General* v. *Kerr*. (1)

Mr. Rogers, *contrà*, relied on *The Attorney-General* v. *Green* (2), and said that in *The Attorney-General* v. *Kerr* one of the leases was held valid.

The MASTER OF THE ROLLS refused any allowance, saying he must adhere to the rule in *The Attorney-General* v. *Green*, and that there were very special circumstances in *The Attorney-General* v. *Kerr*.

[This decision was affirmed by, on appeal, Lord COTTENHAM, L. C., on the 25th of February, 1850, as reported in 2 Hall & Twells, 186, where his Lordship's judgment is reported as follows:]

[2 H. & Tw. 188] THE LORD CHANCELLOR:

It appears to me, upon a review of the authorities, that there is

(1) 50 R. R. 221 (2 Beav. 420; 3 Beav. 425).

(2) 6 Ves. 452, [where Lord ELDON originally declined to make any allowance for expenditure beyond the sum covenanted to be spent by the lessee under the lease.—O. A. S.]

no ground upon which this decree can be impeached. In short, there is nothing which approaches near to an authority to justify the position taken up by the appellant, except the case of *The Attorney-General* v. *The South Sea Company* (1), which comes nearest in point of circumstances to the present; and I must say, that I think if the question were, whether that case should be supported, or all the other cases if they differ from it, I should be much more disposed to find fault with *The Attorney-General* v. *The South Sea Company* than to depart from the general rule—a rule which has been of great benefit, not only to charities but to those who are dealing with charity property. The rule should be ascertained and known, and not depend upon the particular circumstances of each case, although, no doubt, circumstances may arise which may justify a departure from it; but it is an established rule of this Court, that it is its duty to maintain, that leases of this sort, amounting to an alienation, are, *primâ facie* at least, not to be supported; and those who claim benefits under them take them, therefore, with a knowledge that they are liable to be impeached, *and that they subject themselves to such consequences as the ordinary decree for that purpose would expose them to. [*189]

Now, here is a lease of property, the value of which one cannot judge of. The rental which property produces, depends upon its locality and the purposes to which it is applied, and also upon the interests of individuals in the neighbourhood who possess other property of that description. Therefore, to say that the rent is a large rent for a small portion of land, without reference to the circumstances connected with the land or the position of the place, is really saying nothing. We have, however, a fact, that, at a period anterior to 1699, when the lease in question was granted, the land in question was, for two successive periods, let for 9*l.* a-year. Now, there is no reason at all to say that that was not a *bonâ fide* rental: at least, it must be assumed to be so. The leases are produced by which the rent was reserved, and I must assume that the land was worth, to let, 9*l.* a-year, which shows that the present transaction is an actual alienation for ever, (that is to say, for 999 years, which is in effect an alienation for ever,) at an additional rent of 1*l.* a-year. That, of itself, would bring the case clearly within the authorities, that an alienation for such an apparent consideration as this is, cannot be supported. If we look to the fact of what might become of the property and what value

(1) 55 R. R. 137 (4 Beav. 453).

A.-G. v. PILGRIM.

it might attain, it is now, of course, much more palpable than the mere speculation of what naturally must have been the result of such a transaction in the year 1699. At that time of day, it was known that land in a town or neighbourhood such as Norwich was very likely to increase in value; and therefore, it was an alienation for which, upon the face of it, there was no adequate consideration.

[*190] The rule of the Court is, unquestionably, that such a *transaction as that cannot be maintained. But it is said, that particular circumstances may justify the transaction. It is for the defendant to prove those circumstances; and I understand the defendant has gone into no proof at all: he has produced nothing to raise a *primâ facie* case on his behalf, or any ground for inquiry as to there having been any peculiar circumstances connected with the original letting, for taking it out of the general rule. There is an alienation, which is, apparently, for a very inadequate consideration, as compared with the rent reserved upon an ordinary lease; and this alienation is for 999 years. It will not do for the defendant to abstain from going into any evidence, or bringing any case before the Court, and then, at the hearing say, "Now direct an inquiry, there being no foundation whatever for it, to see whether I cannot make out the defence before the Master, which I have not attempted to make out before the Court." That would be involving parties in an unnecessary and expensive litigation. It is the duty of the parties to bring the case fully before the Court. Suppose the case of an information depending upon evidence, which may not be conclusive, but which may still raise a case for inquiry: that is a ground upon which the Court will proceed; but there is nothing of that kind in this case, and there is no evidence touching the original transaction, produced by the party occupying part of the land contained in the original lease. It was indispensably necessary, of course, to deal with that original lease, for that is the foundation of the equity which the Court is called upon to administer. I find a case, therefore, in which a party is holding charity land for 999 years without any apparent consideration, and not explaining why, or how it is, that those parties, who had the care of that property, thought proper to create such a lease. I should be undoing what has been done from the period of the earliest case cited, viz. *Attorney-General* v. *Green*, if I were to hesitate for a moment in saying that this case falls within the rule

[*191] established in the *cases which have been referred to: and there is no exception established on the part of the defendant.

The question of costs is, undoubtedly, a very different one; and I cannot but suppose it forms a very material part of the question upon this appeal, on the part of those who advised it. There is, however, nothing, as it appears to me, upon the pleadings to raise a doubt as to the propriety of the MASTER OF THE ROLLS' decree. I think the principle of the MASTER OF THE ROLLS is that upon which I ought to act, and which is reasonable; namely, to inquire who has occasioned the costs? Why, the party who has caused the institution of the suit. If, upon being applied to, resistance had not been made, the expense would not have been incurred. It is no new discovery—it is not any new fact which the defendant was not at all aware of at the time the application was made—which led to this decree. He knew of the application made, because it turns entirely upon the origin of the title to the land which he is holding himself; that it is charity land, alienated without any apparent reason why that alienation should take place. Besides that, he not only resisted the title of the charity when the claim was made, but he resisted it at the hearing, and he resists it here: and by resisting it, the costs have been incurred. He has a right to resist it, no doubt; but the question is, whether, when we come to consider the costs, we are not to remember who the party is who has occasioned these expenses. It is a party who has set up a title which he cannot maintain. It appears to me that it is a very wholesome rule, that the first question for the Court to consider is, who has occasioned the litigation—whose fault is it that the costs have been incurred? I cannot hesitate for a moment to say, that the costs have been occasioned by a party who has resisted a just and reasonable claim upon the part of the charity.

Then it is said that the churchwardens have concurred. *It is not the expense of the churchwardens concurring: it is the expense of that litigation which the defendant has made necessary; and the costs in question of those parties form part of the costs of that litigation. The proceedings could not go on without those persons, and therefore they were necessary parties, and the defendant ought to pay the costs of the litigation; and I think he ought to pay all the costs that have been occasioned. I cannot make the plaintiff pay them: and the question is, how I am to make these public officers pay the costs themselves, who could not help being brought here if the defendant thought proper to resist the claim, whatever their previous approbation and conduct may have been. When

[*192]

A.-G. v. PILGRIM.

this question commenced they could not help themselves: they had not the power to give up the lease; and, the principal defendant choosing to uphold that lease, made it necessary for the *Attorney-General* to bring before the Court, not only himself, but the other parties, whose costs are now in question. Their costs are, therefore, part of the costs of the general litigation; and whatever may have been the motive of those who advised such an appeal as this, there being such a small property concerned—property apparently of little value—still the litigation has been occasioned, and the costs must be paid, either by the party who is the cause of the litigation, or by those who have necessarily incurred those expenses by the resistance of the defendant. I very much regret that he should have those costs to pay; but I do not think I have any other choice than to affirm the MASTER OF THE ROLLS' decree: and, unfortunately, the costs of this appeal must be included in the costs incurred in the Court below.

1849. *May* 1, 23.

Rolls Court.

Lord LANGDALE, M.R.

[12 Beav. 63]

THE GRAND JUNCTION CANAL COMPANY *v.* DIMES.

(12 Beav. 63—88; S. C. 13 L. T. 358.)

[REVERSED on appeal to the House of Lords: see 3 H. L. C. 759.]

1849. *June* 20.

Rolls Court.

Lord LANGDALE, M.R.

[89]

ROSS *v.* ROSS (1).

(12 Beav. 89—91.)

A party having a contingent interest in a trust fund may, in a proper case, have it brought into Court for his protection; but he must show some sufficient ground for it.

Motion to pay trust fund into Court refused, on the ground that there was no allegation of danger, and that the fund might, if necessary, be sufficiently protected by a *distringas*.

THE testator gave the residue of his real and personal estate unto his brother's children equally, as tenants in common, with cross remainders, in the event of any of them dying under twenty-one.

The testator died in 1831, and administration was granted first to his widow, and afterwards to Susannah, the eldest child, on her attaining twenty-one.

There were eight children, James Augustus, who was the

(1) *In re Braithwaite* (1882) 21 Ch. D. 121, 52 L. J. Ch. 15, 48 L. T. 857.

plaintiff, and seven others. They had all attained twenty-one except Henrietta and Emma.

Part of the testator's property consisted of a sum of stock standing in his name, and by arrangement, this sum was divided, and six eighths paid to the plaintiff and the other five children who had attained twenty-one. The remaining two eighths, being 794*l.* 10*s.*, were still in the Bank, and appropriated as the shares of the infant defendants Henrietta and Emma.

This bill was filed by James Augustus Ross, one of the children, against the widow, the administratrix, and the other residuary legatees, for an account of the real and personal estate. The answer admitted the above facts as to the two eighths of the stock standing in the Bank, under the above arrangement, in trust for the two infant defendants, and stated, that the plaintiff had received more than his share of the residue.

It was now moved, on behalf of the plaintiff, that this sum should be paid into Court, and also for production of documents. [90]

Mr. Turner and *Mr. Renshaw*, for the plaintiff, contended, that as the plaintiff had a contingent interest in the fund, which would take effect in the event of the infants dying under twenty-one, he was entitled to have the fund brought into Court for his protection; and that, pending a suit for administration, the ordinary rule was, to bring the trust money into Court.

Mr. Roupell and *Mr. Batten*, for the infants, resisted the application, on the ground that the plaintiff had nothing but a remote contingency in a small share in the fund which did not exceed 163*l.* That there was no charge of danger or insecurity, and that even if there had been, the plaintiff might protect his interest by a *distringas*. That the plaintiff had acquiesced in the arrangement made upon the division, and that his only object was to create a fund in Court for the payment of the costs of suit.

Mr. Lloyd, for the administratrix, also resisted the application as being unnecessary.

THE MASTER OF THE ROLLS:

Am I bound to order this sum to be brought into Court in a case where I see no danger? There was a time when it was almost considered as a mere matter of course to order trust funds to be brought into Court; but now the question always is, whether there

Ross v. Ross.

exists any sufficient ground for such an interposition. Here, though there has been an appropriation, the plaintiff, who has a contingent interest, is not prevented making this application;

[*91] for a party having merely a contingent *interest in a sum of stock may, no doubt, in a proper case, apply to have it brought into Court. The plaintiff, however, in this case, can sufficiently protect his interest by the ordinary process of *distringas*, and that will save a great deal of complication and expense.

The ground on which I now proceed is this: There is not the least allegation or pretence of any danger to the fund; and it also appears, that there is a debt due from the plaintiff to the estate, which affords ample security to him; besides, the plaintiff may adopt a process out of Court, by which the fund cannot be removed without notice.

The real question is as to the costs of this motion, and I think I ought not to give any.

OLDFIELD *v.* COBBETT (1).

1849. *May* 31.

(12 Beav. 91—96.)

Rolls Court. Lord LANGDALE, M.R.

A motion being refused, with costs, the party cannot afterwards renew the motion till the costs have been paid.

It is not necessary to bring up a party who is in custody for non-payment of costs.

[91]

ON the 30th of March, 1840, on the petition of the plaintiff, an order was made, that the plaintiff's costs of certain impertinence in an affidavit of the defendant should be taxed and paid by Cobbett (not stating to whom). The costs were taxed, and on the 11th of June a *subpœna* for costs issued, directing them to be paid to the plaintiff. Cobbett was then in custody in the Fleet, he having been brought up under a commission of rebellion, issuing out of the Court of Exchequer, and by that Court committed (2), and in consequence the attachment was lodged at the Fleet as a detainer.

[92] The Fleet Prison was abolished by the 5 & 6 Vict. c. 22, and Cobbett was afterwards turned over to the Queen's Prison under the provisions of that statute.

Mr. Greene now moved that Cobbett might be discharged, on

(1) But where a new trial is ordered the non-payment of costs in interlocutory proceedings in the former trial is no ground for staying proceedings in the new trial: *Morton* v. *Palmer* (1882) 9 Q. B. D. 89, 51 L. J. Q. B. 307, 46 L. T. 285.—O. A. S.

(2) See 1 Ph. 557; 65 R. R. 451.

various grounds, [to which it is unnecessary to refer for the purposes of this report]. OLDFIELD v. COBBETT.

Mr. Turner, contrà: [93]

First. On the 26th of March, 1847, a motion was made before the Lord Chancellor to discharge Cobbett from this process, that is, to set aside the *subpœna*, the service of the *subpœna*, and the attachment, and that motion was refused with costs. He now states the particular grounds in his notice of motion; but the object is the same, and a party cannot bring forward the same motion from time to time by merely varying the reasons. This Court, therefore, has no jurisdiction to entertain the motion.

2. He has not paid the costs of the former applications for the same purpose, which have been repeatedly refused with costs. His conduct is oppressive in the extreme. He has been offered his discharge, if he would undertake to bring no action; but he remains in prison harassing the plaintiff with these motions, which have already put him to an expense exceeding 600*l.* [94]

* * * * *

Mr. Greene, in reply.

THE MASTER OF THE ROLLS:

I have great satisfaction in finding the case of Mr. Cobbett brought distinctly before the Court, and to have the grounds so well stated and so forcibly and properly brought before the Court. Hitherto, it has been my *misfortune to have the matter stated in such a way that I could never understand what he was aiming at, but I now know what is sought, and the reasons in support of it. [*95]

If I were merely to consult my own inclination, I should discharge him immediately, finding he has been detained in custody so long as nine years. I should be glad that he suffered no more. But I must consider what it is my duty to do, having regard to the practice of the Court, and to the rights of the plaintiff. Mr. Cobbett might long ago have been out of custody. His discharge has been offered him in Court, on his undertaking to bring no action. I am quite ignorant why that condition was required on the one side, or why it was declined on the other. The parties not being able to come to an accommodation, stand on their legal rights, and I must, therefore, decide them according to the established practice of the Court.

OLDFIELD v. COBBETT.

In the first place, I think Cobbett has no right to make this application to me, because the former application made to me on the same matter was refused with costs, and those costs have not yet been paid.

Next, I think, that as to most parts of this motion, it is substantially the same as that which was refused by the LORD CHANCELLOR, and therefore I have not jurisdiction to review his decision. I am glad, however, that the reasons have been so clearly stated; and, after this argument, I hardly think I ought to abstain from stating my opinion.

[His Lordship then considered and disposed of the various reasons alleged in support of the motion, and concluded by saying:]

[96] I refuse this motion, because Mr. Cobbett is not entitled to make it, he not having paid the costs of the former motion. I think, that in substance and effect, this must be considered the same as the previous motion, and that it is not altered by the new reasons. The case came before me on certain reasons: it was then taken to the LORD CHANCELLOR and by him affirmed, and now the defendant comes before me for the same thing, but on different grounds. This cannot be done.

1849.
March 31.
April 2.

Rolls Court.
Lord LANGDALE, M.R.

EDWARDS *v.* EDWARDS.

(12 Beav. 97—100.)

The equivocal use of the word "issue" in a will may be determined by the fact that in another passage of the same will it is apparently used to mean "children."

[97] THE testator gave the residue of his estate to three trustees, upon trust, in case his daughter Mary should marry, then "to place out and secure the sum of 1,000*l.* in such manner, that she should receive the interest thereof to her own sole and separate use during her life, and the principal sum of 1,000*l.* to be divided equally among her lawful issue, but in default of such issue, then that the said 1,000*l.* should revert to, and again make part of, the residue of his estate." And in case his daughter Marianne should marry, then "to place out and secure the sum of 700*l.*, in such manner, that she should receive the interest thereof to her own sole and separate use during her life, and after her death, the said sum of 700*l.* to be divided equally among her lawful issue, and in default of such issue, the same shall again revert to and make part of the

residue of his estate." And in case his daughter Ann should marry, he directed his trustees to place out the clear residue of his estate and effects, in such manner, that his daughter Ann should receive the interest thereof to her own sole and separate use during her life, and the principal money to be divided, after her death, equally amongst her lawful issue. And in default of such issue of his daughter Ann, in trust to place out and secure the same to the use of his daughter Mary for her life, and after her death, to be equally divided among her lawful issue, and in default of such issue of his daughter Mary, in trust to place out and secure the same to the use of his daughter Marianne for her life, and after her death to be equally divided among her lawful issue.

"And in default of such issue of all his three daughters, then, [98] upon trust, to place out and secure the same to the use of his son John Eliot for his life, and after his death, to be equally divided among his lawful issue; and in default of such issue, then in trust to divide the said residue and remainder of his estate and effects, equally, among all the children of Thomas Randall and Janet Anderson, share and share alike, and in default of lawful issue of either of them, the whole of the said residue or remainder to be divided equally among the children of the other share and share alike."

In a subsequent part of his will he made three several dispositions of money in favour of each of his three daughters for her life, "and to her lawful issue" equally, with gifts over "in default of such issue."

The daughters Ann and Mary died unmarried. Marianne married and had seven children, three of whom predeceased her.

By the decree made in this cause in 1829, the dividends on the whole residuary fund were directed to be paid to Marianne for life, or until further order, with liberty to any of the parties to apply.

Marianne died in December, 1848, and a petition was presented on behalf of her four surviving children, for payment to them of the fund. One of the four surviving children had four children, on behalf of whom a claim was made to participate in the fund.

Mr. Roundell Palmer, for the four surviving children:

The decree, by directing payment of the dividends to Marianne for life, establishes this: That the gift over "in default of lawful issue" is not too remote,

EDWARDS v. EDWARDS.

[99]

The word "issue" is used by the testator as equivalent to "children," in the limitation to the "children" of Thomas Randall and Janet Anderson, and in default of "lawful issue" of either, then among the "children" of the other. "Issue" must, therefore, be construed "children" in the other parts of the will, and either the four surviving children, or they and the representatives of the three who are dead, are entitled to the fund. He cited *Sibley* v. *Perry* (1), *Farrant* v. *Nichols* (2), *Hedges* v. *Harpur* (3), *Williams* v. *Teale* (4), *Ridgeway* v. *Munkittrick* (5).

Mr. Renshaw, *Mr. Goldsmid*, and *Mr. Cotton* argued, that the expression "issue" would let in the grandchildren born before the period of distribution to participation of the fund, as in *Dalzell* v. *Welch* (6). [They also cited *Head* v. *Randall* (7), *Evans* v. *Jones* (8), *Ellicombe* v. *Gompertz* (9), and *Carter* v. *Bentall* (10).]

Mr. R. Palmer, in reply.

THE MASTER OF THE ROLLS:

The expression "issue" may either mean all the descendants in every degree, or it may be used in a more limited sense. The word

[*100]

admits of different meanings, *and when used in an ambiguous or equivocal sense, its meaning must either be collected from the immediate context, or by reference to the mode in which it is used elsewhere in the same will.

But besides this, the same word may, on different occasions, and from the immediate context, have two different meanings, and therefore great difficulties may possibly arise.

But if, in the first part of a will, you have this word used equivocally, and nothing in the immediate context, to enable you to construe its meaning; but, in another part of the same will, you have the ambiguity corrected, and find it used in a particular sense, the presumption is, that the testator has always used it in that sense in which you find it, where he himself has corrected the ambiguity.

That I consider to be the case here. In the first part he has used the word "issue" equivocally, and in the subsequent part he has

(1) 6 R. R. 183 (7 Ves. 522).
(2) 73 R. R. 371 (9 Beav. 327).
(3) 73 R. R. 408 (9 Beav. 479).
(4) 77 R. R. 100 (6 Hare, 239).
(5) 58 R. R. 220 (1 Dr. & War. 84).
(6) 29 R. R. 110 (2 Sim. 319).
(7) 60 R. R. 128 (2 Y. & C. C. C. 231).
(8) 70 R. R. 307 (2 Coll. 516).
(9) 45 R. R. 234 (3 My. & Cr. 127).
(10) 50 R. R. 283 (2 Beav. 551).

used it in such a way as to show that he considered the expression as equivalent to the word "children." I think, therefore, we must assume, that he applied it in that sense in every part of his will. The word, I admit, may have a more extended sense, but on this will, I think the funds are divisible in sevenths between the children who are living, and the representatives of those who are dead.

BAKER *v.* GIBSON.

(12 Beav. 101—103.)

1849.
March 30, 31.

Rolls Court.
Lord LANGDALE, M.R.
[101]

A testatrix having three daughters, gave one-third to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own "next of kin and legal personal representatives": Held, that the class of next of kin was to be ascertained at the death of the testatrix, and that they took as joint tenants.

THE testatrix, Ann Smith, had three daughters, Ann, Lydia, and Elizabeth. By her will, she gave the produce of her real and personal estate to trustees, as to one third to Ann for life, with remainder to her husband for life, with remainder to Ann's children, with remainder to the other two daughters for life, and afterwards to their children, with an ultimate limitation to her (the testatrix's) "own next of kin and legal personal representatives."

She gave the other two thirds severally in a similar way to Lydia and Elizabeth, with similar limitations over, *mutatis mutandis*, with an ultimate limitation "to her own next of kin and legal personal representatives."

The testatrix died in 1807, Ann died in 1808, Elizabeth in 1845, and Lydia, the surviving daughter, in 1846. None of the daughters had children. The question now arose, who took the property under the ultimate limitation to the testatrix's "own next of kin and legal personal representatives" [and whether as joint tenants or otherwise].

Mr. Turner and *Mr. Rogers*, for Crabtree, the legal personal representative of Lydia and Elizabeth, [cited *Seifferth* v. *Badham* (1), *Ware* v. *Rowland* (2), *Holloway* v. *Holloway* (3), *Urquhart* v. *Urquhart* (4), *Say* v. *Creed* (5), *Withy* v. *Mangles*, in this Court and by the House of Lords (6), and other cases].

(1) 73 R. R. 392 (9 Beav. 370).
(2) 78 R. R. 228 (2 Ph. 635).
(3) 5 R. R. 81 (5 Ves. 399).
(4) 60 R. R. 416 (13 Sim. 613).
(5) 71 R. R. 238 (5 Hare, 580).
(6) 55 R. R. 106 (4 Beav. 358); 59 R. R. 95 (10 Cl. & Fin. 215).

BAKER v. GIBSON.

Mr. J. Forster, for the trustee, objected, that the case could not proceed in the absence of those persons who were the next of kin of
[102] the testatrix at the death of the daughters; but

The MASTER OF THE ROLLS said that this was unnecessary, as he considered that point now firmly settled.

[103] *Mr. Roupell* and *Mr. Webb*, for the representatives of Ann, [cited *Woodgate* v. *Unwin* (1), where there was a bequest to A. for life, and after her decease, to her children when they arrived at twenty-one, and it was held, that the children took as tenants in common.]

Mr. Turner, in reply:

In *Woodgate* v. *Unwin*, the children's shares vested on their respectively attaining twenty-one; and vesting at different times, they could not take as joint tenants; but here, the whole vested at the death of the testatrix.

The MASTER OF THE ROLLS said he would consider the question of joint tenancy.

March 31. The MASTER OF THE ROLLS said he had read the will, and was of opinion that the next of kin took as joint tenants.

1849.
April 19.

Rolls Court.
Lord LANGDALE, M.R.
[104]

ELLIS *v.* MAXWELL.

(12 Beav. 104—112; S. C. 13 L. T. 398.)

Residuary personal estate was bequeathed in trust for all the sons and daughters of A. and B. (who were living), the shares to be vested at twenty-one, though "not payable or transmissible" until the deaths of A. and B. The will contained powers of maintenance: Held, that the sons and daughters, on attaining twenty-one, acquired vested interests, subject to the rights of future-born children, and that after attaining twenty-one, they were entitled, in the life of A. and B., to payment of their shares of the income, though not of the capital.

The rents of Irish estates were directed to be accumulated and become part of the personal estate: Held, that although the Thellusson Act did not apply to Irish estates, yet that it applied to the rents, as invested from time to time, and that although the rents, which ought to be considered as *corpus*, might be invested for more than twenty-one years from the testator's death, yet that the income thereof could not.

As to the custody of plate left as heir-looms, in the interval before any person became entitled to the possession.

THIS cause, reported [in 3 Beavan] (2), now came on for further directions.

The testator William Maxwell, by his will, dated the 25th of

(1) 33 R. R. 101 (4 Sim. 129); but see *Stratton* v. *Best*, 2 Br. C. C. 233.

(2) 52 R. R. 235 (3 Beav. 587).

March, 1818, devised his freehold estates to trustees in fee, to the intent that his wife might thereout receive an annuity of 1,000*l.* for her life, and his son John Maxwell (a lunatic) might have applied for his benefit, an annuity of 1,000*l.* The testator directed all the residue of the yearly rents to be invested in the public funds, "to the end that the same might become a part of his personal estate," and to be disposed of in such manner as he should thereafter direct and declare touching or concerning the same.

And, subject to the charges, the testator directed his trustees to stand seised of his freehold estate, to the use of the first son of the body of his son John in tail male, with remainder to the other sons of his son John, successively in tail male, with remainder to his daughter Ann Lyte for life, with remainder to the use of the first son of the body of Ann Lyte in tail male, with other remainders over. And the testator directed, that no person should, under the limitations and trusts aforesaid, *become entitled to the lands in possession, or to the rents and profits thereof, during such time as any antecedent limitations remained in contingency. [*105]

The testator then gave his personal estate to his trustees, "upon the trusts after mentioned, for the benefit of all the sons and daughters of his son John Maxwell and his daughter Ann Lyte, save and except a first born or eldest son," &c. &c.; "and to that end, he directed the trustees to transfer the trust funds unto all his younger grandchildren, equally to be divided between them, as and when being sons they should attain the age of twenty-one years, or being daughters they should attain that age or be previously married, it being his will, that each of their several shares and interests should become vested at that age, or the previous marriage of daughters, though such shares should not become payable or transmissible until after the demise of both his son and daughters." And he directed, that if only one grandchild should live to attain such vested interest, the whole fund should go to such only grandchild.

Power was given to the trustees, although the parents should be living, to apply the interest of each grandchild's "presumptive share," even including an eldest son's share, in their maintenance and education; and the surplus was to be accumulated, and paid with their original shares when vested and transmissible. The will also contained a clause of survivorship of the shares of those who should die without having acquired a "vested interest."

The testator then declared, that, after the decease of his son and

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daughter, as well as during their lives, his trustees should, until the share or shares of all his grandchildren "should become vested [*106] and assignable, transferable *or payable," apply the dividends of the trust funds towards the maintenance and education of every such child and children respectively, including even the eldest.

The testator made his wife, Jane Maxwell, his residuary legatee.

As to his plate, the testator thus expressed himself: "As to my plate, I give the use and enjoyment thereof to my said dear wife during her natural life only, and, after her decease, I give the same, in the nature of an heirloom, to the person who, for the time being, shall be in the actual possession and enjoyment of my freehold estates under the limitations of this my will."

The testator died the 8th of September, 1818, leaving his widow, son and daughter, surviving. He possessed real estates in Ireland.

The testator's son John Maxwell still remained a lunatic and unmarried.

His daughter Ann had four children, the eldest of whom attained twenty-one on the 29th of September, 1839; the second, on the 20th of April, 1843; the third, on the 2nd of June, 1846, and the youngest, on the 10th of January, 1849.

The term of twenty-one years after the testator's death expired on the 8th of September, 1839.

This suit, instituted by the trustees for the administration of the testator's estate, came on for hearing in March, 1841 (1), when [108] [certain declarations were made and] certain enquiries were directed, which being completed, the cause now came on for further directions.

Mr. Turner, *Mr. Spence*, *Mr. Roupell*, *Mr. Walpole*, *Mr. Bagshawe*, and *Mr. Willcock*, for different parties.

The questions were, 1st, whether the grandchildren (other than the eldest) took vested interests in the *corpus* of the personal estate on attaining twenty-one, and whether, although their shares could not be paid until after the death of the testator's son and daughter, the income in the meantime ought not to be paid to them.

2. As to the mode in which surplus rents of the Irish estates ought to be disposed of, which were not affected by the English Act against accumulation, and had been, by the testator's will, directed to be invested and become part of the testator's personal estate.

(1) 52 R. R. 235 (3 Beav. 587).

3. As to the custody of the plate between the death of the widow and the coming into *esse* of a person entitled to the actual possession and enjoyment of the freehold estates. * * *

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THE MASTER OF THE ROLLS: [109]

Some of the difficulties in this case seem to have been overcome at the former hearing; I have therefore no further occasion to advert to them. The question now raised respecting the income of the fund which has been accumulated to the extent permitted by law is, whether that income, the further accumulation of which is forbidden by the statute, is now payable to the persons who have obtained a vested interest in that fund. There is a difference between a gift becoming "vested" and becoming "payable and transmissible;" it may vest at one time and not become payable and transmissible until another time. The testator, I think, has, by this will, made a sufficient distinction between these two things, for he has directed specifically that the fund should be vested at twenty-one, but not payable or transmissible until the death of both his son and daughter. The question then is, what is to take place between those two periods of time?

The children were all infants at the time of the testator's death; there was therefore apparently a long minority to be expected, during which their education, as well as their maintenance, was to be provided for; and the testator has, accordingly, directed the income to be applied for that purpose. The gift is to be vested in the children at twenty-one, although not to be payable or transmissible till the death of two persons, evidently for this reason, because the persons who were to become entitled, might, in the meanwhile, be constantly varying, and other children might even be born, after some of them had attained their age of twenty-one. This is a very good reason why the shares should not be payable or transmissible until the time which he pointed out, if he meant all his grandchildren to take equal shares in the capital sum. But their interests *being vested, and there being a direction for maintenance and education, the question is, why are we to consider that the testator meant that they should not have the fruits of the property after it became vested in them, other than those which he has expressly denied them. [*110]

I do not venture to say that it is perfectly clear, but I think that the reasonable construction of this will is, that I ought to consider that these children, who have all attained the age of twenty-one,

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and have obtained vested interests in the property, and who, according to the intention of the testator, were to be maintained out of it, ought now to receive the fruit of the vesting, with the exception only of that from which the testator has excluded them, namely, the payment of the capital.

I think that, subject to the right of the eldest son to be maintained, as to which there may be a reference, and subject to the contingencies which may increase the number of the class and diminish the shares of each, I ought to declare that the gift is vested, and that they are entitled to have the income of it paid to them.

The consequence is, that so much of the funds accruing after twenty-one years from the testator's death and before the children respectively attained twenty-one, as cannot be allowed to accumulate and has not been disposed of in maintenance, will belong to the widow as residuary legatee. The amount will vary as each child, having attained twenty-one, became entitled to the whole income of his share; but that will be very easily calculated.

With respect to the real estate, I confess there is more doubt about that than anything else in this case. I am *inclined to believe that the construction contended for is right. Considering that the real estate and the income of it is not subject to the provisions of the Thellusson Act (the contrary of which, nobody has contended for), how do the directions of the will apply to it? The testator says distinctly, that the rents are to be invested and become a part of his personal estate, and to be disposed of in the manner directed by the will, that is, to be accumulated: by which I understand, the income is to be added to the principal, which is personal estate. It is not because the rents fall into the personal estate every year that they are to be called the accumulation in the sense which this Court gives to the term. These rents are portions of the personal estate acquired year by year: they become personal estate, and are then to be dealt with like the other personal estate, that is to say, they are to be applied, so far as they may, to the purposes directed by the will, and if any part of the direction of the will cannot be complied with, such as the direction to accumulate beyond the limited period, then I think the income will go in the same way as the income of the other parts of the personal estate; that is to say, to the legatees.

[*111]

I think that the rents fall into the *corpus* of the personal estate, and that the income of it will go, with the income of the other

personal estate, to the grandchildren on attaining their ages of twenty-one. It is a portion of the capital or personal estate, received from year to year, which cannot be allowed to accumulate under the statute, and therefore the income of it, which is a different thing from the accumulation, belongs to the residuary legatees.

As to the plate, it is to be left with the person who shall become first entitled to the possession and the enjoyment *of the estate. If [*112] that cannot be done by the trustees, I must order it to be placed in some place of security. If the trustees can take care of it to the satisfaction of all parties, that would be the most convenient mode of dealing with it for the present; if not, I must place it in some place of security, as, for instance, in the Bank of England.

ABSTRACT OF DECREE.

Declare that the surplus rents and profits of the freehold and leasehold estates form part of the *corpus* of the residuary personal estate, and ought to be invested; and that the income is to be dealt with in the same way as the income of the residuary personal estate.

Declare that the trust for accumulation of the residuary personal estate, including the income from the investment of the surplus rents, beyond twenty-one years, void.

Declare that, subject to the interests of the future children, the three younger children became respectively, on attaining twenty-one, entitled to vested interests in one third of the *corpus* of the residuary personal estate, including the rents; but that such shares will not be payable until the deaths of the survivor of the testator's son and daughter; and that such interests are subject to letting in the younger children of John Maxwell (the son) or any other children of Mrs. Lyte, and to the interest to arise in favour of Henry William Maxwell Lyte, and subject to the right of maintenance of such children till they respectively attain vested interests.

Declaration as to the rights of the widow to the surplus income from the end of the twenty-one years to the children respectively attaining twenty-one.

Separate declarations that each of the three younger children, on attaining twenty-one, became entitled to one-third of the subsequent income of the residue, including the income of the investment of the surplus rents.

Reference as to a suitable allowance to the eldest son Henry William M. Lyte for the future.

1849.
June 2, 5, 6.
July 13, 14, 16, 17, 28.

Rolls Court.
Lord LANGDALE, M.R.

THE ATTORNEY-GENERAL *v.* WYGGESTON'S HOSPITAL (1).

(12 Beav. 113—124.)

Ordinances, made by A., B., and C. under a power contained in a Royal charter, for the management of charity property, followed by an Act of Parliament, confirming all ordinances made or to be made, by A., B., and C. held, under the circumstances, to be unauthorised and not confirmed, and the same, after a great lapse of time, set aside.

A charity was established in the reign of Hen. VIII., for two chaplains and twelve poor. In 1572, Queen Elizabeth, by letters patent, ordained, that the chaplains and poor "in omnibus et per omnia, se gerent, exhibebunt, comiserabuntur et eligentur, juxta ordinaciones, regulas et statuta, in hac parte," to be made by A., B., and C. In 1574, A., B., and C. accordingly made regulations, giving to the master the whole management of the charity property, and authorising him to let on fines, and appropriate the fines to his own use. In 1576, an Act of Parliament confirmed the charter of 1572, and the ordinances made or to be made by A., B., and C. By letting on fines, the property, which was worth 7,000*l.* a year, produced, on an average, only 1,200*l.*, nearly half of which consisted of fines, and was received by the master. The COURT held, that this ordinance was not authorised by the charter or confirmed by the Act of Parliament, and that even if it were, still that this proceeding being shown, in the lapse of time, to be prejudicial to the objects of the charity, the Court would direct a new mode of management to be adopted.

[113]

BY letters patent, dated 13th July, 1513 (5 Hen. VIII.), license was granted to William Wyggeston and others to found an hospital, to consist of two chaplains and twelve poor, to pray daily for the health of the King and Katherine his Queen, during their lives, and also for their souls after their deaths, and also for the health of the said William Wyggeston during his life, and for his soul after death, and for the souls of his progenitors and benefactors. The hospital, when founded, was to be a body corporate, and license was given to endow the same with lands.

The hospital was accordingly founded, and it was alleged, but not clearly proved, that certain ordinances were made by the founder, regulating, amongst other things, the mode of letting and restricting the term to three years.

[114] On the 18th February, 1552 (6 Edw. VI.), the letters patent of King Henry VIII. were confirmed by *inspeximus* letters patent.

On the 7th of May, 1572 (14 Eliz.), letters patent were granted, whereby, after reciting the letters patent of Henry VIII., and that afterwards the said hospital was lawfully founded by William Wyggeston and endowed, and that the then chaplains and poor of the said hospital had besought the Queen to extend her munificence

(1) *A.-G.* v. *Governors of Christ's Hospital* [1896] 1 Ch. 879, 65 L. J. Ch. 646, 74 L. T. 96.

and favour towards them, the Queen, having respect to the glory of God, and wishing the continuation and augmentation of the said hospital, and that so holy and pious a work of the said William Wyggeston should take effect, and, also, in order to continue the piety of worship, and for the better relief and support of the poor, afflicted with want, granted and decreed, that the said hospital should for ever thereafter consist of two chaplains and twelve poor, &c.

The letters patent then proceeded in the following terms: "Volentes insuper qd tam predict' Capellani et pauperes quam alii imposter in suis locis surrogandi aut associand eligend sive adjungend *in omnibus et per omnia* se gerent, exhibebunt, comiserabuntr̃ et eligentur, juxta Ordinacoes, regul, et statuta in hac parte, per dilectum et fidelem consanguineum nostrum Henricum Comitem Huntingdon et predictum consiliarium nostrum Radulphum Sadler Milit cancellarium nostrum Ducatus nostri Lancastr et delectum nobis Georgium Bromley Armigerum Attorn nostrum Generalem Ducatus nostri predicti seu per eor supervenientes imposter fiend et in scriptis redigend specificand et declarand" (1).

These ordinances were to be sealed with the seals of the Duchy of Lancaster and the private seals of the said *Earl, Chancellor, and *Attorney-General*, or the survivor of them. [*115]

The said chaplains and poor were thereby made a body corporate and politic, with power to sue and to take lands &c. with power to lease. And her said Majesty Queen Elizabeth granted to the said chaplains and poor, to the use of themselves and their successors, all and singular the manors &c. which had formerly belonged to the said William Wyggeston, and the rents and profits thereof.

Henry, Earl of Huntingdon, Ralph Sadler, and George Bromley afterwards, in 1574, made and ordained certain statutes and ordinances for the government of the hospital, which, among other things, provided, that the master should have full control over all the rents, revenues, goods, and chattels of the hospital, and should have full, sole, and perfect authority to conclude for the making of leases of the lands and possessions of the hospital, such lands to be leased only for twenty-one years or under, and not above, or for one, two, or three lives, and not above; and upon such leases so much rent or more should be reserved, as had been commonly paid for the same within the space of twenty years next before such lease.

(1) *Sic.* It is not worth while to expand the contractions or to restore the usual marks omitted by Mr. Beavan or his printers in every place but two, as the learned reader will easily see.—F. P.

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That the master should employ all rents, profits of wood, sales, and other money arising from the lands and tenements of the hospital (other than such fines as should be reasonably taken for leases thereafter to be made) to the only use and commodity of the hospital and the incorporation thereof, if the same were not disposed to other uses by the said ordinances; which said fines for leases, it should be lawful for the master of the hospital to take and convert to his own proper use, and to the increase of his living thereto. The master was to receive also yearly, out of *the revenues of the hospital, the sum of 10*l.* for his stipend, and also 7*s.* of yearly rent out of the lands and tenements appointed for the maintenance of the grammar school there, together with such meadowing and hay as the master there used to have, and a house and certain other emoluments. The Chancellor and Council of the Duchy of Lancaster were to have authority to visit the hospital, with power to examine the faults and misbehaviour of the master, brother, or poor folks, with power to deprive the master or brother, upon cause duly proved, either for wilful and immeasurable wasting or consuming any of the lands, tenements, possessions, or goods of the said hospital, by reason of unprofitable and outrageous leases, or wood sales or otherwise, or for placing any poor within in the said hospital for any bribe or reward or less for corrupt religion.

[*116]

In 1576, further additions were made to the charity by Lord Huntingdon, out of which certain payments were to be made to the schoolmaster of the Free School at Leicester, and to certain scholars, and to the master, chaplain, and poor.

By a private Act of Parliament passed the 18 Eliz. (1576), after reciting the foundation of the hospital by William Wyggeston, and the letters patent of 14 Eliz. and the power therein to make ordinances, "for the confirmation and establishment whereof, it was enacted, &c., that the said letters patent of the Queen and all and every the grants, articles, clauses, provisions, authorities, jurisdictions, and ordinances therein specified and granted, and all and singular the ordinances made or thereafter to be made by the said Earl of Huntingdon, Sir Ralph Sadler, knight, and George Bromley, or the survivors of them, according to the tenor of the said *letters patent of the Queen, should stand, remain, and be good, perfect, available, and effectual in the law, to all intents and purposes, according to the purport, true intent and meaning of the same letters patent of the said Queen."

[*117]

The present information, filed in December, 1847, complained

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principally of the mismanagement of the charity property. The property consisted of above 3,100 acres of land, the net rental of which amounted to no less than 6,888*l.* a year, but, by the improvident mode of letting, which had been pursued, an average income of about 1,200*l.* a year only was produced to the charity, of which about 532*l.* consisting of fines on renewals, were received by the master.

The present information stated, that the annual value of the charity property, including the coal mines thereunder, was 10,000*l.* per annum, that the leases were improvident, that the hospital buildings were out of repair, that the ordinances were an excess of the authority given by the letters patent, and that even if the Court should hold them not to be so, yet that they did not authorise the system of leasing, but that they, in fact, ordained that the leases should be let at rack rents.

The master, by his answer, insisted on the present practice of leasing.

Mr. Turner, *Mr. Lloyd* and *Mr. W. Morris*, in support of the information, argued, first, that the ordinances, in regard to the mode of leasing, and to the right of the master to appropriate the fines to his own use, were in excess of the authority given by the charter of Elizabeth, and contrary to Wyggeston's ordinances. Secondly, that these ordinances had not been confirmed *by the [*118] Act of Parliament, which did not refer to them, but only generally to ordinances made according to the authority given by the letters patent; and, thirdly, that if the system were now found detrimental to the charity, the Court had power to correct and alter it: *Berkhampstead Free School* (1), *Attorney-General* v. *Finch* (2).

Mr. Roupell and *Mr. Metcalfe*, for the hospital, and *Mr. James Parker* and *Mr. Bevir*, for the present master, argued, that there was no sufficient proof of the existence of any ordinances made by Wyggeston the founder. That the purposes for which the charity was founded were superstitious uses within the statute of 1 Edw. VI. c. 14: *Attorney-General* v. *The Fishmongers' Company* (*Kneseworth's Charity*) (3); that the property became forfeited to the Crown, and was now subject alone to the charter of Elizabeth, and the Act of Parliament confirming it.

That the present mode of leasing was in conformity with the

(1) 13 R. R. 43 (2 V. & B. 134).
(2) Unreported, V.-C. E. 8th July, 1842.
(3) 50 R. R. 133 (2 Beav. 151; 5 My. & Cr. 11).

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ordinances, and similar to that adopted in the restraining statutes of Elizabeth (1): Co. Litt. 44 a; and could not, after having been acted on for three centuries, be now altered.

They argued, that the visitatorial powers of the Duchy of Lancaster ought not to be interfered with: *Attorney-General* v. *Smythies* (2).

[119] *Mr. Turner*, in reply.

THE MASTER OF THE ROLLS:

Although there are difficulties on some parts of this case; yet as to what is to be ultimately done, I feel no difficulty at all. Here is a foundation for charitable purposes, some of which, no doubt, in their origin were superstitious, and some were not: however the whole property was devoted to uses pious or charitable. This property now produces an income of 7,000*l.* a year; but it has been so managed, that the income arising from the property, without regard to fines, is 650*l.* a year and no more, and upon an average of twenty-four years, the fines have amounted to 531*l.* a year, which have been received by the master and applied by him to his own use, according to the authority which he not unreasonably thought was fully vested in him.

Now to suppose that a charity producing 7,000*l.* a year shall be left with an income of only 1,200*l.* a year, and that very nearly a moiety of the whole shall be applied to the sole use of one member of the corporation, is a thing which I think can hardly enter into the imagination of any reasonable man.

Some how or other, it must be put on a better footing. I sincerely wish that all parties interested would concur in effecting it: but greatly have I been surprised to find obstacles to relief raised by the corporation, who of all others are the persons most interested in getting rid of the abuse. I cannot help thinking, that they have been in some degree misled both as to their interest and as to their rights. That the master should endeavour to retain [*120] for himself an *advantage which he has reason to believe was intended for him by the founder of the charity, is quite natural. He should be attended to with all the regard due to a man who is claiming his rights only; but at the same time, do not let the matter be misunderstood in this respect. He is doing this not for the

(1) 13 Eliz. c. 10.

(2) 45 R. R. 24 (1 Keen, 289; 2 My. & Cr. 135).

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benefit of the charity; but for the purpose of securing to himself a very large income, to which he is entitled, if his argument be right.

It appears that the charity was founded in the time of King Henry the Eighth. After his death, the charters were inspected by King Edward the Sixth, who added a confirmation of them at the end; this could not extend to the superstitious uses; but it is very possible that the revenues intended for superstitious uses were to be applied to the pious uses. It is not my intention, however, to go, even so minutely as the evidence here would enable me to do, into the investigation of very obscure matters in the history of this foundation; nor is it worth while, in my opinion, to do so; but I certainly believe, that there were statutes in the time of Wyggeston, and I think it extremely probable, that those statutes restricted the power of granting leases of this charity property to an extent which it would not even now be thought advisable to do.

In consequence of difficulties which had arisen, and for some reason or other, the full force of which I do not pretend to understand, it was thought proper, on the part of the charity and the persons interested in the charity, to apply to Queen Elizabeth for another charter. The charter granted by her recites the former letters patent, and then proceeds to say, that the then members of the hospital had humbly besought her, that *she would extend [*121] "her Royal munificence and grace upon them." It then proceeds: "We, therefore, having respect to the glory and honour of the high God, and wishing the continuance and increase of the hospital aforesaid, and that such holy and pious work and intention of the said William Wyggeston be duly effected, according to his wish, also for the continuance and increase of pious worship, and for the greater relief and support of the poor and helpless afflicted." Those, therefore, were the objects.

Now, without enquiring minutely why it was thought necessary to apply to her for a new charter and grant, but thinking it highly probable that there were uses which were superstitious and others which were not: thinking it probable that doubts had arisen whether those uses which were superstitious could be supplied by those which were pious (which I think they might have been), it was thought right and expedient, on the part of the hospital and the members of the hospital, to apply to her for a new charter, which was granted for purposes all of which are charitable. Can there then be the least doubt, that the whole revenue of the whole property was intended to be applied to pious and charitable uses?

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The charter proceeded to give the power to make ordinances, which has been the subject of a very great deal of ingenious and learned discussion. My own opinion upon that clause is, that it did not give to the persons appointed power to make ordinances which were entirely to govern the property and possessions of this hospital. The members were, among themselves, to do certain things according to the rules which were to be made. Now those

[*122] rules have been mentioned *two or three times over in the subsequent proceedings. In the subsequent Act of Parliament no such interpretation is given to it as to imply that it extends to the entire and absolute management of the whole property; but rather to the rules which were to govern the house. That it was not to govern the whole property, and did not comprise the power of leasing, is, I cannot help thinking, demonstrated, by the subsequent introduction of a clause for the very purpose of giving a power of leasing. Power being given to certain persons to regulate by ordinances those matters which depend on the conduct of several members of this hospital, they made ordinances which extended a great deal further, for they gave the absolute government and chief management of the property and possessions to the master, and at the same time gave him a power of leasing upon fines, which were to be applied to his own personal use and benefit. Certainly a more imprudent sort of thing, even if it had been allowed, could hardly be imagined, than to make him sole ruler of the property, to determine how much of the revenue should depend on fines, and how much on rent; he himself being entitled to apply the fines to his own personal use and profit. I do not think it is necessary to go very minutely into that.

It is now useless to blame the imprudence and impropriety of the conduct of those no longer in existence; but the result is, that a revenue of 7,000*l.* a year is reduced to 1,100*l.* or 1,200*l.*, half or nearly half of which is applicable to the sole use of the master, and not to the poor people who are the objects of the charity, the object being the "relief and support of the poor and helpless afflicted."

[123] That is the result; but upon the best construction which I can give to this charter, and looking at what is done by the statutes purporting to be made in pursuance of the charter, and thinking that Act of Parliament which afterwards passed did not confirm any thing more than that which was authorised to be done by the letters patent, I am of opinion, that there was an excess of authority

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in making the master the sole governor, and in giving to him the right of determining how much should be fine and how much should be rent, and in giving him the right of applying the fines absolutely to his own use.

Even if it should appear to be otherwise, and that this was within the power, nevertheless, if in the course of the 200 and 300 years, by acting upon the power, it has turned out, and is shown by experience, to be prejudicial to the objects of the charity, to the extent of giving an equal benefit to persons who are not objects of the charity,—namely, to the lessees, for it comes to that, —then I think, that this Court could not avoid saying, that the circumstances were so changed, that the interests of the charity and of the hospital required a new mode of conducting the business and affairs of the charity.

That being my opinion, I think there must be a declaration to the effect I stated before. It appears to me, that the power given by the charter of Queen Elizabeth did not authorise the regulations which have been made, and which have turned out so prejudicial to the charity. With that declaration, refer it to the Master to approve of a scheme; but as I presume that the duties of this master, and the object he has for the good of the hospital, ought to depend a good deal upon the visitors, the scheme must be adopted in a communication *with the visitors, and with a view to having their concurrence. [*124]

[The decree directed an account of the rents from the filing of the original information.

A further proceeding in this suit is reported in 16 Beav. 313, but no further reference to that report is necessary.]

COHEN *v.* WILKINSON (1).

1849. *June* 7, 8.

(12 Beav. 125—137; S. C. 18 L. J. Ch. 378; 13 Jur. 641; 5 Rail. Cas. 741; 13 L. T. 377.)

Rolls Court. Lord LANGDALE, M.R.

A Railway Company authorised to make a line of fifty-six miles, resolved on making only four miles of it, and to abandon the rest: Held, that such a resolution was illegal, both as against the landowners on the line and the shareholders in the Company. [125]

The powers contained in Railway Acts are given only in the contemplation of the supposed public good by completion of the whole work; and this Court will interfere, when it sees that the whole undertaking cannot be completed.

A Railway Company is not like a partnership for general trading purposes,

(1) *Sharpley* v. *Louth and East Coast Railway Company* (1876) 2 Ch. D. 663, 46 L. J. Ch. 259, 35 L. T. 71.

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in which one portion of the business may be abandoned; but it is a partnership for a public purpose, for effecting a work which it is a duty to complete. The obligation to complete the work is co-extensive with the authority to make it.

THIS case came on upon demurrer to the whole bill.

It appeared, that on the 26th day of June, 1846, a special Act of Parliament (1) passed, authorising the making of the Direct London and Portsmouth Railway, which, after reciting "that the making of a railway from the termination of the Croydon and Epsom railway at Epsom, in the county of Surrey, to the towns of Portsea and Portsmouth, in the county of Southampton, would be of great public advantage, by opening an additional, certain, and expeditious means of communication between the city of London and the town and port of Portsmouth and city of Chichester and intermediate towns and districts," it was thereby enacted, that the Companies Clauses Consolidation Act, 1845, the Lands' Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, should be incorporated with and form part of the now-stating Act, and the subscribers were united into a Company for the purpose of making and maintaining a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom in the county of Surrey, to the parish of Portsea, in or near to the town of Portsmouth, and the Company was thereby incorporated.

[126] The Act afterwards recited, that the plans and sections had been deposited; and enacted, that subject to the provisions in the special and recited Acts contained, it should be lawful for the Company to make and maintain the railway and works in the line and upon the lands delineated on the plans, and described in the books of reference, and to enter upon, take, and use such of the lands as should be necessary for such purpose.

And it was enacted, that the railway should commence by a junction with the Croydon and Epsom Railway in the parish of Epsom, in the county of Surrey, and should pass through the following parishes, extra parochial, or other places, or some of them (that is to say), Epsom, &c. &c. &c., and should terminate in the parish of Portsea, in or near the town of Portsmouth in the county of Southampton.

And it was enacted, that the railway should be completed within five years from the passing of the Act, and, that on the expiration of such period, the powers by this or the recited Acts granted to the

(1) 9 & 10 Vict. c. lxxxiii.

Company for executing the railway, or otherwise in relation thereto, should cease to be exercised, except as to so much of the railway as should then be completed.

A considerable sum of money was subscribed for the purpose of making the railway; but no part of the line had as yet been made or commenced.

The plaintiff, an original subscriber to the undertaking, and now entitled to seventy-one shares therein, filed this bill on behalf of himself and the other proprietors other than the defendants, against the chairman and directors, and the Company, alleging (as *the [*127] COURT considered with sufficient distinctness,) that the Company and the directors had abandoned all intention of constructing the railway from Epsom to Portsmouth, a distance of fifty-six miles, and had determined to make a railway which should extend from Epsom to Leatherhead, being a distance of about four miles only.

It alleged, that the Company and the directors had taken no proceedings whatever for the exercise of their compulsory powers of taking or purchasing any lands situate between Leatherhead and Portsmouth; and that the period within which such powers might be exercised was then so nearly expired, that it had become almost, if not quite, impracticable to take and purchase such lands between those two places, as would be necessary for the purpose of the undertaking, if the whole line were to be formed.

The bill alleged, that it was and is the duty of the defendants to construct the whole railway, in consideration of which the Act was passed and its powers given, and that to apply the funds of the corporation for the construction of only a part of the railway was illegal. It prayed a declaration, that it was not within the power of the Company to make the proposed railway from Epsom to Leatherhead only, and that the funds of the Company could not be lawfully applied for that purpose; and it prayed an injunction from making the railway from Epsom to Leatherhead only, and from applying the funds of the said Company for that purpose, and from purchasing lands, and from entering into any contract for causing the said proposed railway to be constructed.

To this bill the defendants filed a general demurrer.

Mr. Malins and *Mr. Bovill* in support of the demurrer: [128]

* * If the acts complained of are within the powers of the governing body and capable of confirmation at a general meeting, they

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cannot be made the subject of a suit in equity: *Foss* v. *Harbottle* (1) *Mozley* v. *Alston* (2), *Lord* v. *Copper Miners' Company* (3). * * *

(THE MASTER OF THE ROLLS: I recollect hearing Lord ELDON, in the case of *Agar* v. *The Regent's Canal Company* (4), most distinctly state his opinion, that if it were clear that the Company were unable to complete the whole canal contemplated by the Act, they could not lawfully begin any part of it.)

[129] That was a case between the Company and an independent landowner; but this is a case between the members of the same Company. The Court cannot enter into an examination of the means and prospects of the Company of completing the undertaking: *Salmon* v. *Randall* (5). * * *

They also cited *Ware* v. *The Grand Junction Water-works Company* (6).

[130] *Mr. Turner* and *Mr. Cole, contrà*, in support of the bill:

The question raised by this demurrer is not whether the directors can make a portion of the railway, with a view to completing the whole, but whether having determined not to make fifty-two miles, they can apply the funds in making the remaining four miles alone. * * *

[132] It is on the faith of the due completion of the undertaking, that the Legislature sanctions the Act, and on the same reliance individuals become subscribers to, and shareholders in, the undertaking. To make a mere fraction of a railway, and abandon the rest, is a violation of the engagement. Such an act is *ultra vires*, and an illegal use of legal powers; it is void, and not merely voidable, and is incapable of being confirmed as against one dissentient shareholder: *Preston* v. *The Grand Collier Dock Company* (7), *Natusch* v. *Irving* (8), *Colman* v. *The Eastern Counties Railway Company* (9), *Bagshaw* v. *The Eastern Union Railway Company* (10).

The Act explicitly states in the recital, the object of passing it, viz. because it "would be of great public advantage, by opening an additional, certain, and expeditious means of communication between" London and Portsmouth. This object will not be

(1) 62 R. R. 185 (2 Hare, 493).
(2) 65 R. R. 520 (1 Ph. 790).
(3) 78 R. R. 270 (2 Ph. 740).
(4) 18 R. R. 68 (1 Swanst. 250). See 14 R. R. 217.
(5) 45 R. R. 306 (3 My. & Cr. 439).
(6) 34 R. R. 136 (2 Russ. & My. 470).
(7) 54 R. R. 380 (11 Sim. 327).
(8) 76 R. R. 54 (2 Coop. t. Cott. 358).
(9) 76 R. R. 78 (10 Beav. 1).
(10) 86 R. R. (7 Hare, 114; 2 Mac. & G. 389).

fulfilled by making four miles of the railway between Epsom and Leatherhead. * * *

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Mr. Malins, in reply.

The MASTER OF THE ROLLS reserved judgment.

THE MASTER OF THE ROLLS:

June 8.

This case is shortly as follows: The defendants, the Direct London and Portsmouth Railway Company, are constituted under an Act of Parliament, enabling them to construct a railway from near Epsom to Portsmouth, with the usual powers of raising a capital in shares, and of taking the lands required for making the road. It was enacted, that the Lands Clauses Consolidation Act and other Acts for 1845 should be incorporated in the Act; and moreover, that certain specified communications should be completed within three years from the passing of the Act. The Act received the Royal assent on the 26th of June, 1846. The plaintiff was an original subscriber to the undertaking, and is now entitled to seventy-one shares in the Company. A considerable sum of money has been subscribed, but no part of the line of railway has yet been made or commenced; and the bill alleges (in my opinion with sufficient distinctness) that the Company and the directors have abandoned all intention of constructing the railway from Epsom to Portsmouth, which is a distance of fifty-six miles, and have determined to make a railway which shall extend from Epsom to Leatherhead, being a distance of about four miles only. The bill alleges, that it was and is the duty of the defendants to construct the whole railway, in consideration of which the Act was passed, and its powers given, and that to apply the funds of the corporation for the construction of only a part of the railway is illegal. It prays a declaration, that it is not within the power of the Company to make the proposed railway from Epsom to Leatherhead only, and that the funds of the Company cannot be lawfully applied for the purpose, and prays for an injunction. [133]

To this bill the defendants have put in a general demurrer; they must, therefore, be held to admit the facts stated, and to insist, that the persons who govern the Company have a right, under this Act, to make as much or as little as they please of the whole railway, and have a right to apply the capital raised by the subscriptions of the shareholders in constructing so much of the railway as they think proper. [134]

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I apprehend it to be perfectly clear, that the powers given by these Acts are given only in the contemplation of the supposed public good to be obtained from the completion of the whole work authorised, and that it never is, or can be, deemed to be intended, that the powers would have been given on any less consideration, or any less obligation upon the parties to whom the powers are given.

There are two classes of persons who may be affected by any deviation from that principle. The owners of the land over which the work is to pass, and the shareholders who have subscribed their money for the work.

In the case of *Salmon* v. *Randall* (1), the present LORD CHANCELLOR showed, that the principle laid down by Lord ELDON in *Agar* v. *Regent's Canal Company* (2), did not apply to the case then before him, and he commented upon its inapplicability, in some other circumstances which he particularly mentioned; but he stated the principle as one which might be extremely important in its application, and stated the ground of it as being, that where Acts of Parliament impose certain severe burthens on individuals, by interfering with their private rights and private property, for the purpose of *obtaining some great public good, if the Court sees that the undertaking cannot be completed, and therefore that the public cannot derive that benefit which was to be the equivalent for the sacrifice made by the individual, the Court will protect the individual from being compelled to make that sacrifice under the circumstances, and until it appears that the public will derive the proposed benefit from it.

[*135]

Upon this principle, I conceive, the Court is to interfere, when it sees, at a proper time and in proper circumstances, that the undertaking cannot be completed, and the protection due to the owners of the land called on to make sacrifices for the public benefit is to be afforded.

The interference and protection are not to be made or afforded upon surmises and conjecture, or upon occasions and in a manner in any way inconsistent with the powers given by Parliament, with reference to circumstances existing when the Act passed, but only in circumstances arising subsequent to the Act, in which it clearly appears, that the object which Parliament had in view cannot be obtained, and the consideration for which private rights were intended to be sacrificed has failed.

(1) 45 R. R. 306 (3 My. & Cr. 439).

(2) Referred to, 18 R. R. 68 (1 Swanst. 250). See 14 R. R. 217.

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But it is said, that no such protection ought to be afforded to the shareholders, who are bound by the acts of the Company of which they are members. Let their situation be considered. Happily, on this occasion, I have no need to take account of the gambling speculations, the cheats and dupes who have become so notorious. I may, at this time, reasonably assume, that all parties have been and are acting *bonâ fide*, and then, a shareholder is a person who has subscribed *and paid his money, no doubt on the faith of an [*136] undertaking sanctioned by Parliament, on the ground of its being expected and intended to produce public benefit by its completion: his object may be his own particular benefit or profit; but his advances are made on a scheme, the whole of which must be considered as that which alone has been approved and authorised by Parliament, which is to be conducted and managed in the way approved by Parliament, for the end proposed by Parliament, and for no other end; and the governing body of which must be considered to have entered into the obligation to complete the work authorised. It is on these expectations that the shareholders become members, and I am of opinion, that they are entitled to have these expectations realised if they can.

The Company is not like a partnership for general trading purposes, in which one part may be encouraged, and another discouraged or abandoned, according to the contingencies of trade, and a general authority to use the capital to the best advantage, within a general authority to trade; but it is a partnership for a public purpose, for effecting a work which it is a duty to complete, and for which alone, the capital is advanced in shares. The obligation to complete the work appears to me to be co-extensive with the authority to make it. The Acts contain no authority to substitute a less work, or part of the whole for the whole, and if the governors or directors of the Company take on themselves to determine that they will not perform the whole work, but apply the capital, collected on the faith of the whole work being completed, in completing only a part of it, I am of opinion that the determination is without authority, and contrary to the provisions of the Act of Parliament.

I am clearly of opinion, that they act illegally as against the land- [137] owners; and if there were not, as I think there are, sufficient reasons for saying that they act illegally as against the shareholders, I should have been glad to hear an answer to the question put by *Mr. Cole*—"Why are the directors to be allowed to involve the

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shareholders in an illegality, and the consequence of an illegality, towards the landowners?"

I need not speak of the consequences of allowing such authority. It is plain that certain portions of the shareholders might defeat the authorised intention of all the rest, founded on the authority of Parliament, and apply the funds in a manner quite different from, and even contrary to, the intentions of the contributors.

On this occasion there is no controversy as to facts: the powers were given for the whole work: the directors have, as I must now take it, determined to perform only a part.

I am of opinion that the shareholders are not bound by that determination, and that there is or may be a right to relief in this Court.

I must overrule this demurrer (1).

1849.
June 12, 18.

Rolls Court.

Lord LANGDALE, M.R.

On Appeal.
1849.
Nov. 6.

Lord COTTENHAM, L.C.

COHEN *v.* WILKINSON (2).

(12 Beav. 138—150; S. C. 18 L. J. Ch. 411; 13 Jur. 641; 13 L. T. 417; affirmed, 1 Mac. & G. 481—487; 1 H. & Tw. 554; 5 Rail. Cas. 758; 14 Jur. 491.)

It appeared that a Railway Company had neither the intention, nor the means, nor any probability of obtaining the means, of completing the whole of the line authorised by their Act; but they appeared to have the means and intention to complete a part only. An injunction was granted, at the instance of a shareholder, in the form of restraining the Company from applying the funds in the construction of the part only, or otherwise than with the view and purpose of completing the whole.

[138]

THE demurrer in this case having been overruled, the plaintiff now moved for an injunction to restrain the directors from making the proposed railway from Epsom to Leatherhead only, and also from applying any of the funds of the said Company for that purpose, and from taking or purchasing, on behalf of the Company, any lands for the purpose of making such proposed railway; and also from entering, on behalf of the said Company, into any agreement for the purchase of any such lands, and from taking any other steps or proceedings for effecting any such purchase or purchases, and that they might be restrained from entering into or signing, on behalf of the said Company, any contract or agreement with any contractor or other person or persons, for causing the proposed railway from Epsom to Leatherhead only, or the work

(1) See next case.

(2) *Sharpley* v. *Louth and East Coast Railway Company* (1876) 2 Ch. D. 663, 46 L. J. Ch. 259, 35 L. T. 71.

thereof, or any portions of such railway or works to be constructed or executed, or relating thereto.

Affidavits were filed on both sides; but it is only necessary to state the effect of them, as collected by the Court, and on which its decision proceeded. From them the COURT concluded, "that, at the present time, the Company had neither the intention, nor the means, nor any probability of obtaining the means, of completing the whole line, under the powers they now possessed. That they seemed to have the means and intention to complete a part only, and that they thought *that their doing so would be advantageous [*139] to the shareholders" (1).

The affidavits on behalf of the defendants also stated, that they had entered into some contracts with landowners on the line, and also with contractors for the works, and they attempted to connect the plaintiff with a rival Company.

Mr. Turner and *Mr. Cole*, in support of the motion, relied on the decision of the COURT upon the demurrer (2), and argued, that it was now plain from the affidavits, that the directors intended only to complete the line between Epsom and Leatherhead. That the compulsory powers expired on the 26th of June, and rendered it impossible to complete the whole line, the Court ought to interfere, to prevent that act, which it had already decided, would be an illegal application of the funds of the Company.

As to the alleged collusion, they said, that *Colman* v. *The Eastern Counties Railway Company* (3) was expressly in point, for there the plaintiff had been put forward by a rival Company.

Mr. Malins and *Mr. W. J. Bovill, contrà* [cited *Lee* v. *Milner* (4)]:

The Company may apply to Parliament for additional powers, to [141] relieve them from any temporary difficulties.

They also cited *Salmon* v. *Randall* (5) and *Ware* v. *Grand Junction Water-works Company* (6).

Mr. Turner, in reply. * * *

THE MASTER OF THE ROLLS: [142]

I shall not decide this case until I have very carefully read these affidavits. I think it due to the Company to do that.

(1) See *post*, p. 60.
(2) *Ante*, p. 47.
(3) 76 R. R. 78 (10 Beav. 1).
(4) 47 R. R. 463 (2 Y. & C. (Ex. Eq.) 611).
(5) 45 R. R. 306 (3 My. & Cr. 439).
(6) 34 R. R. 136 (2 Russ. & My. 470).

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I remain now of the same opinion that I was when the demurrer was heard, that a Company constituted by Act of Parliament, with powers to construct a line of a certain length and leading from one
[*143] place to another, *does at the same time enter into an obligation with the public, and with persons who subscribe to the undertaking, to complete that line, and that they are not entitled to use the powers given by the Act of Parliament for the purpose of constructing only a portion of that line. The bill alleged that the defendants were doing that, and the demurrer admitted it; and it was on that I overruled the demurrer.

We have, no doubt, quite a different question to deal with now, when we treat the subject upon evidence, and not on a formal admission by means of a demurrer. It is now alleged upon affidavit, and not clearly denied, if denied at all, that the defendants intend to apply the funds of the Company in the construction of a portion of this line only. It must be admitted, that a Court interfering in transactions of this nature, ought to have satisfactory ground on which to proceed.

It is alleged by the plaintiff, that it clearly appears in the result from the affidavits, that this Company does intend to proceed no further than Leatherhead. It is alleged, on the other side, in this way: we have, by untoward circumstances, been unable, as yet, to complete the line or any portion of the line: in fact, no portion of it is constructed: we have got the means of constructing the line from the junction at Epsom to Leatherhead: this is a portion of the whole way, and therefore we are now doing that which we were empowered to do by the Act of Parliament. Being empowered to make the whole, we must have the power to make each and every part: the whole cannot be constructed at once, it must be constructed in portions; and this is a portion of the very line which we are under an obligation to construct.

[144] It is said, that courts of equity will never interfere with a Company of this kind, while it is acting within its powers. I think there is a fallacy in this. What are its powers? The Company has the power to construct each and every part with a view to the construction of the whole: true it is that you must construct each part separately, but although the Company has the power to construct each and every part, successively, with a view to the construction of the whole, does it then follow, that this is within the powers, if it be made clearly to appear, that they have no

intention to complete the whole? Is a Company to be allowed to do this? No case has gone that length.

I am not going to decide the point at this moment, for I intend very carefully to peruse these affidavits, to see whether they afford the evidence which I ought to have of the fact, that this Company is unable, or do not intend, to complete the whole line.

THE MASTER OF THE ROLLS: *June* 18.

I have seen no reason to alter the opinion which I expressed on the demurrer which was filed in this cause.

A corporation created by Act of Parliament, having obtained authority to construct a railway from one place to another (as, for example, from Epsom to Portsmouth), and having, under their powers, obtained subscriptions and raised a capital under that authority, are, in my opinion, bound to apply the capital so raised in or towards the construction of the whole line; and are not entitled to apply the capital so raised in the construction of a part of the line only, any otherwise than as the construction of such part is necessary for and *conducive to the construction of the whole line, under the [*145] powers conferred by the Act.

Any other opinion would, as it seems to me, be entirely contrary to the principle upon which such powers are given; and if it were established, that Companies of this sort had authority, without a view to the whole, or for the purpose of performing the whole, to perform such part only as they please or are able, of that which has been called their contract or bargain with the public, I think the consequences would be very dangerous to the public and to the shareholders, and probably productive of very extensive deception and fraud.

I am well aware of the great difficulties which may occur in exercising the jurisdiction of this Court, either in cases where the practicability or the intention of completing the whole work may reasonably be doubted, or in cases where there may be a reasonable doubt, whether the injunction of this Court may not possibly interfere with the execution of the powers conferred by Act of Parliament, or destroy a reasonable hope that the powers still existing may be exercised according to the intentions of Parliament. But, nevertheless, I must consider myself bound to perform my own duty, and to exercise the jurisdiction, if it does sufficiently appear to me, that the powers still existing in the Company are intended and about to be exercised contrary to the intentions of

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Parliament, or contrary to the conditions on which the shareholders must be deemed to have subscribed their capital.

I have considered the cases relating to this subject, and particularly
[*146] the cases of *Agar* v. *Regent's Canal* *Company (1), *Blakemore* v. *Glamorganshire Canal Company* (2), *Lee* v. *Milner* (3), *Salmon* v. *Randall* (4), and *Reg.* v. *Eastern Counties Railway Company* (5). And if I were informed by the defendants, that they, having or expecting to obtain the means of constructing the whole line from Epsom to Portsmouth, were now applying or intending to apply the capital raised for constructing the whole line in and for the construction of a part with a view to the whole, viz. of that particular part which extends from Epsom to Leatherhead as a necessary part of and conducive to the whole, and for the purpose of making and completing the whole line, which may and is intended to be completed under the powers now vested in the Company: if I were so informed in a proper manner, my opinion is, that I ought not to interfere with the Company; but if the Company now decline, or are unable to state distinctly that such is the case, I think, that under the present circumstances of this case, and on the application of the plaintiff, it is my duty to prevent, that which I must consider to be, an intended misapplication of the subscribed capital of the Company.

The Act of Parliament, intituled, "An Act for making a railway from the Croydon and Epsom Railway at Epsom to the town of Portsmouth, to be called 'the Direct London and Portsmouth Railway,'" received the Royal assent on the 26th of June, 1846. No part of the railway has yet been formed, and in the early part of 1848, the directors made an application, which was refused, to
[*147] the Commissioners of Railways *to extend the powers of the Act for the compulsory purchase of lands for two years beyond the period for which such powers had been given to the Company.

In this state of things, the Company have lately been active in making preparations for the construction of that part of the whole line which extends from Epsom to Leatherhead. It is, I think, truly said to be the duty of the defendants to construct the whole line from Epsom to Portsmouth, and the plaintiff, a shareholder in the Company, objecting to the construction of a part only, instead

(1) Cited, 18 R. R. 68 (1 Swanst. 250). See 14 R. R. 217.
(2) 36 R. R. 289 (1 My. & K. 154).
(3) 47 R. R. 463 (2 M. & W. 824; 2 Y. & C. (Ex. Eq.) 611).
(4) 45 R. R. 306 (3 My. & Cr. 439).
(5) 10 Ad. & El. 531.

of the whole line,—to the performance of a part only, instead of the whole of the conditions on which he subscribed for and became entitled to his shares,—asks the interference of this Court, and by his bill has distinctly alleged, and in his affidavit has sworn to his belief, that the defendants intend to stop at Leatherhead, having no means or intention of going on to Portsmouth; and he insists, that it was no part of the conditions on which he became a shareholder, that the capital, or any part of the capital of which he is a shareholder, should be applied in the construction of a railroad from Epsom to Leatherhead. What is the answer? No statement is made that the Company has or expects to obtain the means of constructing the whole line, or now intends to apply the capital and funds which have been subscribed for the whole line, in or towards the completion of the whole line.

But Mr. Parson states, very distinctly, how much has been done in the way of preparing for the construction of the road from Epsom to Leatherhead, and also states some things, from which, though it is not distinctly stated, it is (as I collect from a subsequent part of the affidavit) meant to be suggested, that something has been done, which may in some way contribute *towards the construction of [*148] parts of the line between Leatherhead and Portsmouth.

Mr. Parson also states, that in his opinion it is, at this time, quite practicable to take and purchase such lands between Leatherhead and Portsmouth as would be necessary for the purpose of the undertaking, if the whole line were to be formed. It is difficult not to infer, from this mode of expression, that Mr. Parson does not think that the whole line is to be formed.

Mr. Wilkinson states his opinion to be, that the formation of the whole line would be a great public benefit, and he says, that neither the Company nor the directors have ever determined not to make the railway from Epsom to Portsmouth, although, from the circumstances of the times and financial considerations, it has not been possible to proceed in or towards the making, otherwise than as before stated by Mr. Parson (*i.e.* as I understood it), further than in making preparations for constructing the railway from Epsom to Leatherhead, and doing the other acts mentioned by Mr. Parson, and to which I have referred.

He then states, that the construction of the railway to the extent and in the manner in which it is now proposed to be constructed, (*i.e.* I repeat it, as I understood it, from Epsom to Leatherhead only,) will, in his opinion, be very beneficial to the interests of the

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shareholders, and that it is much desired by the inhabitants of Leatherhead and the districts adjoining, and without suggesting that the Company has or is likely to overcome the difficulties which have made it impossible to proceed, otherwise than as before stated, he says, he thinks it very probable, that the whole of the said [*149] Direct London and Portsmouth Railway or some *railway in the same line, will be made at some future period.

In this affidavit, much which is not said is, I conceive, designedly left to inference and presumption; and if I should unfortunately have come to an erroneous conclusion upon the evidence produced, I shall very sincerely regret that the defendants have not thought fit to express themselves more clearly; but, upon this affidavit, considering not only what is said, but also what is omitted to be said, and which I must presume would have been said, if it could have been said truly, I think myself obliged to conclude, that, at the present time, the Company have neither the intention nor the means, nor any probability of obtaining the means, of completing the whole line, under the powers they now possess. They seem to have the means and intention to complete a part only, and they think that their doing so would be advantageous to the shareholders. Granting that to be so, I am of opinion that, without the authority of another Act of Parliament, they have no right to apply the capital subscribed for the whole line to that limited purpose. The powers of this Act of Parliament were not given, nor did the shareholders subscribe their capital, merely to enable the Company to make profit (though for the benefit of the subscribers themselves), nor to complete a particular portion of the work, neglecting the rest, merely because that particular portion is much desired by the inhabitants of Leatherhead and its vicinity, nor merely upon the chance that, by some means or other, the whole line authorised by the Act, or some other line, will or may be made at some future time. But the terms and conditions of the Parliamentary work are otherwise defined, and the powers given are to be exercised in making and completing the whole line from Epsom to Portsmouth, [*150] *and only for that purpose. And as the defendants now, when a proper occasion seems to me to have arisen, are unable or unwilling to say, that they are applying or intend to apply the funds or capital of the Company now in their possession, for or towards that entire purpose, I am of opinion that I should neglect my own duty, if I did not grant an injunction to restrain them, not indeed in the words asked for in the notice of motion, but in the terms which

appear to me proper from the nature of the case. I propose, therefore, to order as follows:

Let an injunction issue to restrain the defendants from applying the capital and funds of the Direct London and Portsmouth Railway Company, or any part thereof, in or towards the construction of a railway from the Croydon and Epsom Railway, commencing by a junction therewith in the parish of Epsom, to Leatherhead in the county of Surrey only, or any otherwise than for the purpose and with the view of making and completing the said railway from the said Croydon and Epsom Railway as aforesaid to the parish of Portsea, in or near the town of Portsmouth, in the county of Southampton, pursuant to the powers now vested (or hereafter to be vested) in them by Act of Parliament.

[Affirmed by Lord COTTENHAM, L. C., on the 8th November, 1849, as reported in 1 Mac. & G. 481.

The defendants having moved to dissolve the injunction,]

The LORD CHANCELLOR [without calling on the plaintiff's counsel] observed that the main point in the case, namely, the right of an individual member of a Company to restrain that Company from applying its funds to a purpose different from that to which he had subscribed, was one well settled in this Court; that the question therefore reduced itself to this,—was what the Company here contemplated doing, the purpose for which the plaintiff had subscribed; in short, could it be said that the line of railway proposed to be constructed between Epsom and Leatherhead, a distance of four miles only, was equivalent to the construction of a railway between Epsom and Portsmouth. His Lordship remarked that a railway from Epsom to Portsmouth might, in the estimation of the plaintiff, have been a good speculation, while the construction of a line for the four miles which the Company proposed making, might have been considered a very bad speculation. His Lordship then added: the injunction which has been granted, while it leaves it entirely open to the Company to complete the whole work, very correctly restrains the defendants from applying the funds of the Company to the construction of a *portion only of that work, a purpose clearly different from that to which the plaintiff has subscribed. It has been argued that this injunction is an interference with the legal powers of the Company; but in my opinion it is exactly the reverse, for it is founded upon a legal right, which courts of law

[1 Mac. & G. 486]

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have frequently recognised as existing between the public and a Company. In the present case, the obligation which the Company has incurred is sought to be enforced at the instance of the shareholder, who is also entitled to have the contract, to which he has subscribed, strictly performed. Every case which has been referred to distinctly establishes the doctrine for which the plaintiff contends.

His Lordship concluded by observing that the only part of the case about which he entertained any doubt was the allegation at the Bar, though nowhere apparent in the bill, that the plaintiff had been aware of and had acquiesced in the substituted undertaking.

The plaintiff's counsel then stated that this was the first time that such an allegation had been made, and that it was entirely unfounded.

The LORD CHANCELLOR thereupon ordered the appeal motion to be dismissed with costs.

1849.
July 28.

Rolls Court.
Lord LANGDALE, M.R.
[12 Beav. 182]

HARDEY *v.* GREEN (1).

(12 Beav. 182—190; S. C. 18 L. J. Ch. 480; 13 Jur. 777.)

Articles were executed previous to a marriage, by which the husband and wife agreed, that all property, estate and effects to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint; and in default, on trusts for the husband, wife and children. At the time, neither husband nor wife had any property, the husband was insolvent, and soon after the marriage took the benefit of the Insolvent Act. Property subsequently descended on him: Held, as against his assignee, that it was bound by the articles.

A FEW hours previous to the marriage of James Brooke Irwin and Elizabeth Bevan, articles were executed between them, dated the 29th of June, 1843, whereby it was agreed, that as soon as conveniently might be, an indenture of settlement should be made and executed, by and between the said J. B. Irwin and Elizabeth Bevan, and all other proper and necessary parties, whereby all and singular the real and personal estate, property, and effects, then of or belonging to the said Elizabeth Bevan, or in or to which she might thereafter become interested or entitled, by any means whatsoever, should be conveyed and assigned to trustees therein named; to hold on

(1) See *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523, 58 L. J. Q. B. 75, 60 L. T. 162, and *In re Clarke* (1887) 35 Ch. D. 109 (affirmed, 36 Ch. Div. 348, 56 L. J. Ch. 981, 57 L. T. 893), and *In re Reis* [1904] 2 K. B. 769, 73 L. J. K. B. 929, 91 L. T. 592, C.A., where reference may be found to several later cases on this subject. —O. A. S.

such trusts &c., as Elizabeth Bevan should appoint, and in default for her for life, with remainder to J. B. Irwin for life, with remainder to their children; and it proceeded as follows: "And it is hereby agreed, that the said intended settlement shall contain power to change trustees, and for their indemnity and reimbursement, and all other proper, usual, necessary and advisable clauses, provisoes, and agreements, and also a covenant on the part of the said J. B. Irwin, that all property, estate, and effects, to which he, or the said Elizabeth Bevan may hereafter become entitled, shall be settled and limited to the same uses, upon the same trusts, and for the same ends, intents, and purposes, as aforesaid."

James B. Irwin and Elizabeth Bevan alone were parties, and there was no attesting witness.

The marriage was solemnised the same day. Neither party had any property at the time, and the husband *was considerably [*183] indebted, and the wife had nothing but some expectations.

On the 6th of November, 1843, J. B. Irwin took the benefit of the Insolvent Debtors' Act, and it appeared from his schedule that his debts amounted to 4,133*l.*, and his property *nil*. On the 2nd of January, 1844, the final order was made, and his estate and effects, present and future, became, under the 5 & 6 Vict. c. 116, s. 7, vested in the official assignee. On the 6th of December, 1845, the brother of James B. Irwin died in India intestate, leaving James B. Irwin his heir and one of his next of kin. He thereupon became entitled to some real estates in Westmeath and Fermanagh in Ireland, and to one-fifth of his brother's personal estate.

The articles were not registered in Ireland until the 15th of June, 1846; and in order to procure their registration, it became necessary to have an attesting witness to them. The parties thereupon drew a dry pen over their signatures, in the presence of a witness who attested the execution, and on that they were registered.

Afterwards, the Westmeath estate was conveyed, by a trustee, in whom the legal estate was vested, and the husband, on the trusts of the settlement. The Fermanagh estate was also conveyed by the husband and wife, on the same trusts, and both those deeds were registered prior to the 12th of February, 1847. The certificate of the appointment of the assignee was not registered until the 15th of February, 1847, and subsequent to the conveyances.

The parties proceeded to sell some of the estates; but a difficulty having occurred, in consequence of the assignee having given notice of his claim, this bill was filed by the trustee of the marriage

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settlement, and the *wife, praying that the articles and settlement might be established, and that the assignee might convey and assign the real and personal estate.

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Mr. Turner, Mr. J. J. Jervis, and *Mr. Dunne*, for the plaintiffs, [cited *Prebble* v. *Boghurst* (1), *Lewis* v. *Madocks* (2), and *Randall* v. *Willis* (3)]:

[185] The articles and the deeds were registered before the certificate of the appointment of the assignee, and, therefore, according to the decision in *Battersby* v. *Rochfort* (4), they have priority.

Mr. Lewin for the husband, took no part in the discussion.

Mr. Flather for a disclaiming trustee.

Mr. Hoare, for the administratrix of Eyles Valentine Irwin, the brother.

Mr. Roupell and *Mr. Rogers*, for Green, the assignee of James B. Irwin:

First. This is * * a mere fraudulent contrivance, resting in contract, to relieve any property he might ever possess from the legal obligation of paying his debts, and to keep it nominally under [*186] the *control of his wife. This is a fraud upon the law; and a party claiming under it must come in *pari passu* with the other creditors.

Secondly. This is not a valid covenant capable of being enforced in equity. There is no case in which a covenant so unlimited and extravagant has been supported. In *Randall* v. *Willis* (3), *Lewis* v. *Madocks* (2), *Garthshore* v. *Chalie* (5), *Eardley* v. *Owen* (6), *Prebble* v. *Boghurst* (1), *Logan* v. *Wienholt* (7), the covenantor still retained some property, real or personal. * * *

[187] Thirdly. According to the true construction of this instrument, the property in question is not included: at all events, to a limited extent only. The real agreement was to settle the wife's estate only, and the intention of the subsequent covenant was to bind the

(1) 1 Swanst. 309. See 48 R. R. 179, *n*.
(2) 7 R. R. 10 (8 Ves. 150; 17 Ves. 48).
(3) 5 R. R. 40 (5 Ves. 262).
(4) 69 R. R. 343 (2 Jo. & Lat. 431).
(5) 7 R. R. 311 (10 Ves. 1).
(6) 76 R. R. 213 (10 Beav. 572).
(7) 36 R. R. 215 (1 Cl. & Fin. 611; 7 Bligh, N.S. 1).

husband to settle the future acquired "property, estate, and effects" to which the wife or the husband, in her right, might become entitled. * * The articles created no specific lien on the property, [which vested in the assignee, *Barton* v. *Tattersall* (1)], and the wife must come in with the other creditors: *Fremoult* v. *Dedire* (2).

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They argued also that the registration of the articles was informal, in consequence of the second execution of them after marriage.

Mr. Turner, in reply. * * *

THE MASTER OF THE ROLLS: [188]

In this case we are not upon a bill to set aside the agreement for fraud, or to rectify it, as founded on some mistake. No bill has been filed to set it aside, or to rectify it. I must therefore take the settlement as it is.

The relief asked is resisted, on the ground that the covenant is so extravagant and so contrary to the policy of the law, that, *ex necessitate*, it must be treated as fraudulent, and the wife, who has married on the faith of this agreement is to be deprived of the benefit of it. There is neither evidence nor allegation that she has participated in any fraud whatever. If the question here were upon the reasonableness or unreasonableness of such a settlement as this, a great deal might be said by way of warning and useful advice to persons about to enter into such contracts. This has not now to be considered, because, in the absence of all fraud, the wife before she married had a right to insist on these terms. I at first understood that the lady had property of her own; but it is now stated that she had none; so that neither of them had any property at the time. Thus circumstanced, they entered into an agreement, that whatever either of them acquired should be settled. There is nothing very unreasonable in that; but then the terms of the settlement are, that all that either of them should become entitled to, should be subject to the power of appointment of the wife, independent of her husband. She did not think fit to marry except on these terms, and the husband, I presume, having confidence in the person he was about to marry, acceded to them.

However imprudent it may be to enter into such an agreement, [189] I cannot, after all the cases that have occurred on this subject, consider this as an agreement that ought not to be executed. I cannot find any such proof of fraud, or that it is so contrary to the policy of the law as to render it necessary for me to say, that the parties

(1) 32 R. R. 204 (1 Russ. & My. 237). (2) 1 P. Wms. 428.

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who have married on the faith of it, are not to have the benefit of it. It cannot be held that a person merely because he is insolvent cannot enter into a binding contract: it is every day's practice, however contrary it may in some cases be to fair dealing.

Next, it is said, that the husband took the property subject to all his obligations, and that the trustee also takes the estate subject to them. I can find no precedent for that; it would, perhaps, be more honest if it were held that he was only entitled to the property after payment of his debts. But that is not the law. A man may be entitled to property, which by a proper proceeding may be made liable to answer his existing obligations, but he may prevent it by disposing of that property.

It has been also argued, that the last covenant had reference to the wife's property only; but the words expressly include all property to which he or she might thereafter become entitled. It is possible that it might have been so meant; but I can only deal with the words as they are found on the instrument, and I must give effect to them. If that be so, has any thing been done to alter this, and vest the property in the assignee? I think that if it is vested in the assignee, it is still bound by the obligations which the husband had previously created.

[190] Lastly, it is said, that there was no attestation at the time of its execution. That was unnecessary, except for the purpose of registry in Ireland, and the officers in Ireland have admitted it to registry on the tracing of the name, and nothing has been done to declare it invalid. If it were invalid, what would become of the other deeds?

Is there, then, any ground for defeating the rights of the wife under the terms of these articles? I think not. I must make a declaration of the plaintiffs' right, and decree a conveyance. The defendants must have their costs.

HARRISON *v.* GRIMWOOD (1).

(12 Beav. 192—199; S. C. 18 L. J. Ch. 485.)

1849. *July* 30. *Aug.* 8.

Rolls Court. Lord LANGDALE, M.R.

Construction of a bequest in the form of a direction to "pay, apply, and divide" amongst children "when and as" they should severally attain twenty-six.

A testator directed his trustees to pay and apply the interest of his

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(1) *Fox* v. *Fox* (1875) L. R. 19 Eq. 286; *In re Wintle* [1896] 2 Ch. 711, 65 L. J. Ch. 863; *In re Turney* [1899] 2 Ch. 739, 69 L. J. Ch. 1, 81 L. T. 548, C.A.

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residuary estate to his daughter for life, for the support of herself and issue; and, after her decease to "pay, apply, and divide the principal" amongst all her children, "when and as" they should attain twenty-six. There was a trust for maintenance during minority, and a power of advancement not so restricted: Held, that the children took immediate vested interests, and that the gift was not too remote.

In this case, the testator John Nunn Grimwood directed his residuary estate to be converted into money and invested at interest, upon trust that the trustees should, as the interest became due, pay and *apply one third part of it to his daughter for life, "for the support of herself and what issue she might have," and after her decease, "upon trust to pay, apply, and divide one third part of the said principal trust monies unto and among all and every" her children "when and as they should severally and respectively attain the age of twenty-six years;" with benefit of survivorship, if any should die under twenty-six years of age without issue. [*193]

And if, at the time of his daughter's decease, any of her children should be under twenty-one years of age, upon trust to place and put out the principal share or shares of such child or children, so under age, upon Government or real securities, and during the minority of such child or children, pay, apply, and dispose of the interest and proceeds, or a competent part thereof, in, for, and towards the maintenance and education of such child or children.

And the testator empowered his trustees and executors, if they thought proper and that it would be for the benefit of any of the children, to apply such part of the share of such child or children, as they should think necessary, in putting out apprentice or otherwise in advancing such child or children in the world.

And in case his daughter should die without leaving any child, or leaving only children who should die under the age of twenty-six years without issue, he directed that the principal trust monies so given to her so dying and to her issue, and all accumulations of interest thereof should go over, as in the will mentioned.

The suit was instituted for the administration of the estate, and, the tenant for life being dead, the question *now raised was, whether the gift in the form of a direction to pay when the children attained twenty-six, was or was not void for remoteness. [*194]

Mr. Malins and *Mr. Toller* for the children:

* * 1. The gift is of a residue, and the Court always strongly inclines to construe a bequest of a residue as vested (1), in order to

(1) *Booth* v. *Booth*, 4 R. R. 235, 240 (4 Ves. 399, 407): see *Milsom* v. *Awdry*, 5 R. R. 102, 104 (5 Ves. p. 466).

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prevent an intestacy: *Leake* v. *Robinson* (1). 2. The children take an immediate interest, even in the lifetime of their parent, for the daughter is to take for life "for the support for herself and issue." They, therefore, are entitled to be maintained during their mother's life (2). 3. There is a provision for the maintenance and education of the children during their minority, which circumstance has always been relied [*195] on in favour of vesting: *Davies* v. **Fisher* (3). 4. The will empowers the trustees to apply the share of a child in putting apprentice, or otherwise in advancing him, and this is not limited to his minority. 5. The gift over is in case of the children dying under twenty-six without issue: therefore the issue were intended to take through the parent, and for that purpose it is necessary to hold that they took vested interests: [*Bland* v. *Williams* (4). The age of twenty-six is the period of payment, and not of vesting.]

Mr. Roupell and *Mr. Selwyn* and *Mr. Teed* and *Mr. Cardwell*, for parties in the same interest, [referred to *Phipps* v. *Ackers* (5), and distinguished *Bull* v. *Pritchard* (6)].

[196] *Mr. Turner* and *Mr. J. T. Humphry, contrà:*

The gift to the children is too remote: [*Leake* v. *Robinson* (7), *Blagrove* v. *Hancock* (8), *Boughton* v. *James* (9), and *Boughton* v. *Boughton* (10). Nothing less than an absolute gift of the whole intermediate income is sufficient: *Hanson* v. *Graham* (11), *Watson* v. *Hayes* (12), *Batsford* v. *Kebbell* (13), *Bull* v. *Pritchard* (6)].

[197] In *Vawdry* v. *Geddes* (14), where a gift upon attaining twenty-two was held void, there was a positive direction to apply the interest in the maintenance and for the benefit of the children; and in *Blagrove* v. *Hancock* (8) there was a trust for the support and maintenance of the children.

The form of the gift in *Davies* v. *Fisher* (3) was not a direction to pay and divide, but a trust for the children, and to be divided at twenty-five.

(1) 16 R. R. at p. 180 (2 Mer. p. 386).
(2) *Hamley* v. *Gilbert*, 38 R. R. 189 *n.* (Jac. 354); *Hammond* v. *Neame*, 18 R. R. 15 (1 Swanst. 35); *Foley* v. *Parry*, 39 R. R. 163 (2 My. & K. 138); *Broad* v. *Bevan*, 25 R. R. 123 (1 Russ. 511, *n.*).
(3) 59 R. R. 468 (5 Beav. 201).
(4) 41 R. R. 93 (3 My. & K. 411).
(5) 39 R. R. 94, 115 (5 Sim. 44; 3 Cl. & Fin. 665, 702).
(6) 25 R. R. 27; 71 R. R. 229 (1 Russ. 213; 5 Hare, 567).
(7) 16 R. R. 168 (2 Mer. 363).
(8) 80 R. R. 91 (16 Sim. 371).
(9) 66 R. R. 14 (1 Coll. 26).
(10) 73 R. R. 116 (1 H. L. C. 406).
(11) 5 R. R. 277 (6 Ves. 239).
(12) 48 R. R. 249 (5 My. & Cr. 125).
(13) 4 R. R. 15 (3 Ves. 363).
(14) 32 R. R. 196 (1 Russ. & My. 203).

There is nothing to qualify the first contingent gift, which therefore remains invalid, and void for remoteness. HARRISON v. GRIMWOOD.

Mr. Naylor, for other parties, argued against the validity of the gift.

Mr. Toller, in reply: [198]

In *Blagrove* v. *Hancock*, the expression was "may be applied" towards education: here the words are imperative—"shall apply."

THE MASTER OF THE ROLLS:

I will not dispose of this case without first looking at the authorities.

THE MASTER OF THE ROLLS: *Aug.* 3.

The question is, whether, under this particular will, the gift to the children of the testator's daughter is void for remoteness, or whether the children took vested interests, subject to be divested on an event which made the limitation over void for remoteness.

When a gift is made to such of a class or description of persons who shall attain a certain age, those who do not attain the prescribed age are excluded from the character of legatees, by the description expressly employed by the testator himself in that part of his will.

A direction to pay implies a gift, and a direction to pay only to such persons as shall attain a certain age (unless controlled by other words clearly and decidedly preventing that effect) will prevent the implied gift from vesting in any object of it who does not attain that age. But a direction to pay an indefinite class of persons, when and as they attain the age, is ambiguous. It does not necessarily, or at least so strongly as the description of the class before mentioned, tend to prevent the vesting in interest. The gift itself and the time of payment are not necessarily identical: though the gift itself is found in the direction to pay, the words may mean only to postpone the payment, without postponing the vesting of the gift.

And though, when the gift is found or implied only on the [199] direction to pay, and is not otherwise affected or explained by the context of the will, the Court may reasonably construe the direction to be only for the persons to whom the payment is directed to be made, and who are to receive at the time indicated, yet, as the meaning is ambiguous, and as the nature of the gift is only known

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by implication, we must look at other parts of the will, with a view to discover whether they afford any further indication or explanation of the implied gift.

This case, like all others of the same class, appears to me, partly from the nature of the subject and partly from the state of the authorities, to be very doubtful; but observing the right given to the children to be maintained out of the interest or income given to their mother, and arising or accruing on the share eventually given to them: observing the direction, in the case of minorities, to place out that share, and apply the interest or a competent part of the interest arising from it (though it is not necessarily all the interest which is directed to be applied, and that only during minority),—and noticing also the power given to the trustees to advance them in the world; I think that I ought to conclude, that a vested interest was given to the children of the daughter.

1849.
Nov. 7, 12.

Rolls Court.
Lord LANGDALE, M.R.
[200]

RANELAGH *v.* RANELAGH (1).

(12 Beav. 200—206; S. C. 19 L. J. Ch. 39.)

Pecuniary legacies were severally given to A., B., C. and D. "during their natural lives;" and in case of the demise of any of them "without legitimate issue," his proportion was to be divided amongst the survivors. A. died, leaving children: Held, that they did not take by implication, but that on A.'s death, his legacy fell into the residue.

THE testator, Lord Ranelagh, by his will, dated the 20th of August, 1814, gave his residuary personal estate, in trust for the benefit of the plaintiff, Lord Ranelagh, for life, and, after his decease, for the benefit of his first and other sons, with certain limitations over.

By his first codicil he expressed himself as follows: "My daughter, Mary Ann Jones, having a fortune of 10,000*l.*, which I hold in trust for her, &c., I give her for the present only 200*l.* to buy mourning. I give to my two daughters, Sarah Antonia Jones and Louisa Jones, during their natural lives, 4,000*l.* each. I give to my two sons, Thomas Cowley Jones and Thomas Edward Jones, 2,000*l.* sterling each, during their natural lives. Legal interest at 5*l.* per cent. to be paid to all of them, in equal quarterly payments, commencing from the day of my decease, till my son the Honourable Thomas Jones, or my heir in entail, attains his or her twenty-first year of age. To prevent any mistake or misconception of my

(1) *In re Rawlins' Trusts* (1890) 45 Ch. D. 299, affirmed [1892] A. C. 342.

directions, I repeat my intentions respecting the above legacies in figures:

To Mary Ann Jones 200*l.* to be paid forthwith.

Sarah Antonia Jones	£4,000	5*l.* per cent. interest, to be paid quarterly till my heir is twenty-one years of age.
Louisa Jones -	4,000	
Thomas Cowley Jones	2,000	
Thomas Edward Jones	2,000	

"In case of the demise of any of the above parties without [201] legitimate issue, their, his, or her proportions to be divided equally amongst the survivors."

By another codicil, he stated that the above legacies were to be paid out of monies he had in the public funds.

At the hearing, it was held, that dying "without legitimate issue" meant, not an indefinite failure of issue, but a failure of issue living at the death of the legatee (1); and it was ordered, that the several legacies should be carried over to the separate account of the several legatees, and the dividends were to be paid to the legatees for life or until further order; and upon the deaths of any or either of the legatees, liberty was given to any person interested to apply.

Upon the death of Sarah Antonia Jones in 1840, without having been married, it was held, that the survivors took her share absolutely (2).

In March, 1849, Thomas Cowley Jones died, leaving three children, and his legacy was now claimed, 1. by his children, 2. by Lord Ranelagh, and 3. by the executrix of Thomas Cowley Jones.

Mr. Roupell and *Mr. Biggs*, for the children of Thomas Cowley Jones, argued that the children took by implication, for the legacy was only given over to the survivors in the event of there not being issue of the legatee living at his death. That this necessarily implied, that the testator did not intend the legacy to go over, if there were children of the legatee to take. [They cited *Ex parte Rogers* (3), and commented on *Andree* v. *Ward* (4) and *Greene* v. *Ward* (5).]

Mr. Giffard, for the executrix of Thomas Cowley Jones. * * * [202]

(1) 39 R. R. 233 (2 My. & K. 441).
(2) 55 R. R. 132 (4 Beav. 419).
(3) 17 R. R. 239 (2 Madd. 449).
(4) 25 R. R. 36 (1 Russ. 260).
(5) 25 R. R. 38 (1 Russ. 262).

RANELAGH v. RANELAGH.

Mr. Turner and *Mr. Calvert*, for Lord Ranelagh:

The legacy is undisposed of, and falls into the residue. The gift to Thomas Cowley Jones is expressly limited for life, and there is no gift to his issue, or any expressed intention that they were to take; such a bequest cannot be supplied by implication, for that would be to make a will for the testator. * * *

[203] *Mr. Cox*, for the legal personal representative of the testator.

Mr. Roupell, in reply. * * *

THE MASTER OF THE ROLLS:

I will take an opportunity of reading over the cases cited.

Nov. 12. THE MASTER OF THE ROLLS:

The late Lord Ranelagh, by his will dated the 20th August, 1814, gave his residuary personal estate on trust for the benefit of the plaintiff, Lord Ranelagh, for life, and, after his decease, for the benefit of his first and other sons, with certain limitations over.

By his first codicil, he gave to his daughters, Sarah Antonia Jones and Louisa Jones, during their lives, 4,000*l.*, and to his sons, Thomas Cowley Jones and Thomas Edward Jones, 2,000*l.* sterling each, during their natural lives; and after giving directions respecting the payment of interest, and enumerating the legacies, he expresses himself thus: "In case of the decease of any of the above parties without issue, their, his or her proportions to be divided equally amongst the survivors;" and by another codicil he stated, that the above legacies were to be paid out of monies he had in the public funds.

[204] On the hearing of the cause it was determined (1), that the words in the first codicil, "decease without issue," ought to be construed as relating to issue living at the death of the legatees respectively; and the legacies were ordered to be carried to the separate account of each legatee, with directions to pay the dividends to each legatee for life, and liberty was given to any person interested to apply upon the death of his legatee.

The decree was affirmed upon a rehearing before the Lord Chancellor (2).

On the death of Sarah Antonia Jones, one of the legatees, without having been married, the legacy standing to her account was

(1) 39 R. R. 233 (2 My. & K. 441). (2) 39 R. R. 236 (2 My. & K. 447).

claimed, 1. by her legal personal representative, 2. by the surviving legatees, and 3. by Lord Ranelagh, who contended, that the gift to the survivors was for life only, and not an absolute gift. It was held, that the survivors of the legatees took this legacy absolutely.

Another of the legatees, Thomas Cowley Jones, is now dead, and he has left three children him surviving.

On this occasion, two petitions are presented; one by the children of the legatee, who claim the fund by virtue of a gift, which, they say, is to be implied from the terms in which the gift over to the survivors is expressed—"on decease without issue." The other petition is by Lord Ranelagh, as residuary legatee, who, in the absence, as he alleges, of any gift over to the survivors of the legatees, claims to be entitled to this legacy as part of the testator's residuary estate.

The question therefore is, whether, as against the residuary legatee, a gift to the children of the particular legatee for life is, in the absence of any expressed gift, to be implied, from the circumstances of the gift over being made dependent upon the legatee for life dying without issue living at his death. [205]

If the legacy had not been expressly limited to the legatee for life, I apprehend, that in the event which has taken place of the gift over not taking effect, the legatee would have taken the legacy absolutely; the gift to him would not have been defeated, and a gift to the children would not have been implied.

In this case, the legatee, by the express words of the codicil, takes no interest beyond his life; and if there be no further gift of the legacy, the residuary legatee, who takes subject to all that is not otherwise well given, must be held entitled.

The issue of the legatee is named in the codicil only in the description of contingency on which the legacy is given over; and I am unable to find any thing which assists in collecting an intention to give to the children. I can collect no particular intention to give this legacy to the residuary legatee, and I cannot answer the question proposed by Sir THOMAS PLUMER, in *Ex parte Rogers* (1), why the children were named on the occasion of the gift over. But in that case, there seems to have been found some further reason, which does not here exist, for inferring an implied gift; and on the whole, my opinion is, that the legacy falls into the residue. I think it extremely probable that the testator did mean a benefit to the children: but *si voluit non *dixit.* I think that there is not [*206]

(1) 17 R. R. 239 (2 Madd. 449).

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sufficient to raise the implication, and that the legacy falls into the residue.

Let the costs of all parties be paid out of the fund.

1849.
Nov. 6, 7, 12.

Rolls Court.
Lord LANGDALE, M.R.

[206]

LAPRIMAUDAYE *v.* TEISSIER (1).

(12 Beav. 206—208; S. C. 19 L. J. Ch. 16; 13 Jur. 1040.)

The interest on funds was given to husband and wife during their lives, or the life of the survivor. In the suit, the fund had been carried over to the account of "the husband and wife their stock account," and the dividends were to be paid to them and to the survivor: Held, that the dividends unreceived during their joint lives belonged to the survivor.

THE testator bequeathed to Brook Baines Hurlock and Charlotte his wife a sum of 10,000*l.* 3*l.* per cent. Consolidated or Reduced Annuities, at the option of his executor, to be put in their joint names and that of his executor; they the said Brook Baines Hurlock and Charlotte his wife to enjoy the interest thereof during their joint lives, or the life of the survivor of them; and, after their decease, if any children, to be equally divided amongst them, him, or her, if only one; and if they should both die without issue of their marriage, the 10,000*l.* was given over.

By the decree, made the 4th day of July, 1811, it was ordered, that the defendant Stephen Teissier should transfer into Court, to an account to be entitled "Brook Baines Hurlock and Charlotte his wife, their stock account," the sum of 10,000*l.* 3*l.* per cent. Consolidated Bank Annuities. And it was ordered, that the dividends to accrue thereon, when so transferred, should be, as and when the same should, from time to time, accrue and become due, paid to Brook Baines Hurlock and Charlotte his wife during their joint lives, and to the survivor of them during his or her life, or until the further order of the Court. And after their decease, it was ordered,

[*207] that any person or persons *interested therein or entitled thereto should be at liberty to apply.

Brook Baines Hurlock died in March, 1849, leaving Charlotte Hurlock, his widow, and also a daughter.

At the time of his death four half-yearly dividends, amounting to 582*l.* 10*s.*, were unreceived; and the Accountant-General declined to pay the same to any person without the order of the Court.

The widow now presented a petition for payment of these arrears of income.

(1) *Cogan* v. *Duffield* (1876) 2 Ch. Div. 44, 45 L. J. Ch. 307, 34 L. T. 593.

Mr. Lewin in support of the petition:

The widow is entitled to the fund by survivorship.

1. By the terms of the gift, by which the testator has given the income to the two for their joint lives, or the life of the survivors, a joint-tenancy and not a tenancy by entireties is created, and the income not having been received, survives to the widow as joint-tenant.

2. The terms of the decree are such as to determine that the husband and wife were joint-tenants; for the income is to be paid to the husband and wife "during their joint lives and to the survivor of them." * * *

[208]

Mr. Miller, contrà, for the representatives of the husband:

1. The gift to the husband and wife is not and cannot be in joint-tenancy: they are tenants by entireties, and there is no right of survivorship.

In *Atcheson* v. *Atcheson* (1), where there was a gift to a husband and wife as tenants by entireties, all the Court could do was, to direct the dividends to be paid to the husband during the joint lives of the husband and wife, and preserve the rights of the wife to the *corpus*.

2. The husband does not claim a chose in action in right of his wife, but he claims in his own right, and, therefore, the cases are inapplicable. Maintaining his wife and family a husband is entitled to the income of his wife's estate; and even if it were a separate estate, no account would be decreed against him beyond a year: *Beresford* v. *Armagh* (2).

Mr. Lewin, in reply, was stopped by

The MASTER OF THE ROLLS, who said, that, if the fund was standing to the account stated in the petition, he thought the petitioner was entitled.

Nov. 12.

Mr. Lewin stated that the stock stood to the account of "B. B. H. and C. his wife their stock account."

THE MASTER OF THE ROLLS:

Then I think the unreceived dividends go to the survivor.

(1) 83 R. R. 230 (11 Beav. 485). (2) 60 R. R. 428 (13 Sim. 643).

1849.
Nov. 17.

Rolls Court.

Lord LANGDALE, M.R.

[209]

IN RE JERVOISE (1).

(12 Beav. 209—210.)

Observations on the effect of carrying over funds to separate accounts in the Accountant-General's books, and to the importance of affixing appropriate headings thereto.

When a fund is carried over to a particular separate account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account.

IN this and many other cases, the Court has had occasion to call the attention of the practitioners to the importance of carrying over funds to separate accounts in the Accountant-General's books, and affixing appropriate headings thereto. It is important that the view of the Court, on these occasions, should be generally known.

The MASTER OF THE ROLLS has expressed himself to the following effect:

There are few points of practice so neglected and respecting which so little is to be found in the books, as that relating to the heading of accounts in the Accountant-General's books. It is, however, a matter of great importance, and one which, when properly attended to, saves a considerable expense to the suitors, and diminishes the labour of the Court in investigating the title upon any subsequent applications to deal with the fund.

When a fund is carried over to a particular separate account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. The consequence is, that in all subsequent dealings with it, it becomes unnecessary to serve any of the parties to the cause except those interested in the particular fund; and the Court, from the heading
[*210] of the account, sees *at once the extent to which it has been severed from the other questions in the cause on the former hearing.

I have often had occasion to call attention to this subject, and wish it were more attended to.

(1) *In re Eyton* (1890) 45 Ch. D. 458, 59 L. J. Ch. 733, 63 L. T. 336; *Edgar* v. *Plomley* [1900] A. C. 431, 69 L. J. P. C. 95, 82 L. T. 573.

STURGE *v.* STURGE.

(12 Beav. 229—245; S. C. 19 L. J. Ch. 17; 14 Jur. 159.)

1849.
May 29, 30, 31.
June 1.
Nov. 5.

Rolls Court.
Lord LANGDALE, M.R.

[229]

A conveyance by the plaintiff, an eldest son, to the defendants his brothers, of his interest in an estate, for an inadequate consideration, set aside, on the ground of the plaintiff's ignorance of his rights, and of the absence of a full and free disclosure of all the material facts known by the defendants, and of the plaintiff being under pecuniary pressure and without proper legal advice.

An estate was devised to E. S. in tail. By her marriage settlement she retained a power of appointing the fee, and by her will she appointed it to her children, excluding the eldest, otherwise provided for. No fine or recovery was levied after her death. After her death, the eldest and the four younger sons agreed to divide the estate, and the eldest agreed to sell his share to the latter, and he accordingly conveyed all his interest. The conveyance was set aside on the grounds above mentioned.

THIS case was argued by

Mr. Turner and *Mr. Cairns*, for the plaintiff.

Mr. Bethell and *Mr. Follett*, for Daniel Sturge and Tobias Walker Sturge, and the executors of Samuel Sturge.

Mr. De Gex, for Earl De Grey, a purchaser.

Mr. Roupell and *Mr. Smythe*, for Thomas Buckland.

Mr. Amyot, for Joseph Mill.

Mr. Lloyd and *Mr. Stinton*, for another purchaser.

Mr. Turner, in reply.

[*Stockley* v. *Stockley* (1), *Dunnage* v. *White* (2), *Dent* v. *Bennett* (3), *Gordon* v. *Gordon* (4), and other cases, were cited.]

The MASTER OF THE ROLLS reserved judgment. [230]

Nov. 5.

THE MASTER OF THE ROLLS:

This bill is filed by William Sturge, for the purpose of setting aside a deed dated the 15th day of October, 1841, which, he says, he was induced to execute by misrepresentation and fraud, without consideration, and whilst he was ignorant of his right to the property which the deed purported to convey.

On the 10th of July, 1769, the property in question, called the

(1) 12 R. R. 184 (1 V. & B. 23).
(2) 18 R. R. 33 (1 Swanst. 137).
(3) 48 R. R. 94 (7 Sim. 539; 4 My. & Cr. 269).
(4) 19 R. R. 230 (3 Swanst. 400).

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Chilworth estate, was devised by the will of William Mill (the plaintiff's grandfather), to his daughter Elizabeth Mill, and unto her issue lawfully to be begotten, and to the heirs of such issue for ever; but in case his said daughter should die without issue lawfully begotten, he further devised as in his will stated.

The testator died soon after the date of his will, leaving his daughter Elizabeth surviving him.

That this will gave an estate tail to Elizabeth Mill was not disputed in the argument of this case.

[231] In September, 1785, Elizabeth Mill being about to marry Toby Walker Sturge, the plaintiff's father, an indenture of settlement, dated the 14th day of September, 1785, was executed by and between Elizabeth Mill of the first part, Toby Walker Sturge of the second part, and John Player and James Hooper of the third part, and thereby it was purported, that Elizabeth Mill conveyed the estate in question (which is in the settlement described as the estate devised by William Mill to her and her issue, and the heirs of such issue for ever) to hold to the trustees on the trusts therein mentioned, which, after the solemnization of the marriage, were, for the husband for life, with remainder to the wife for life, with remainder to such uses as she should by deed or will appoint. No fine or recovery was levied or suffered, but the marriage took effect, and there was issue surviving at the date of the will of Elizabeth Sturge, five sons and one daughter; the sons were: 1. William, the plaintiff; 2. the defendant Daniel; 3. the defendant Tobias Walker Sturge; 4. Samuel Sturge, who was living in October, 1841, but is since deceased; and 5. John Mill Sturge, who died in December, 1824, in the lifetime of his mother: and the daughter was Hester Sturge (afterwards Sargeant), who died in September, 1836, in the lifetime of her father.

Elizabeth Sturge, by her will, dated the 12th of February, 1821, after reciting the settlement of the 14th of September, 1785, gave and devised unto such of her four younger sons, Samuel, Daniel, Tobias Walker, and John Mill, as should be living at the time of her death (other than and except such of her said sons as, by the death of the plaintiff and all his issue, if he should have any, might become the eldest son and heir for the time being of herself and her husband), their heirs, executors, administrators, and

[*232] assigns, from and immediately *after the death of her husband, the several lands comprised in the settlement, together with certain leaseholds, to hold the same to her said sons as tenants in common,

and to the heirs, executors, administrators, and assigns, subject to the life estate of her husband, and charged with one full fifth part of the value thereof, to be invested for the benefit of her daughter Hester and her children. And she declared, that the plaintiff was excluded from any benefit of her said devise, because he was otherwise well provided for.

The testatrix died on the 25th of August, 1825, without having altered her will, leaving Toby Walker Sturge, her husband, surviving.

It is said, that in the year 1827, Toby Walker Sturge being entitled in tail to an estate called Sodbury, levied a fine and executed a settlement, whereby that estate was limited to himself for life, remainder to the plaintiff, his eldest son, in fee. And that in the years 1829 and 1830, the plaintiff borrowed different sums of money, to the amount in the whole of 3,500*l.*, on the security of his interest in that estate.

It is further said, that in 1833, the plaintiff William having failed in his business, became so reduced in his circumstances, that he returned to his father's house, and lived there in dependence on and supported by him.

On the 25th day of March, 1841, the father died, having first made a will, whereby he gave all his real and personal estate to his sons Samuel, Daniel, and Tobias Walker, except that he gave to the plaintiff a legacy of 50*l.* only, stating as a reason that William was otherwise well provided for, and he appointed *Samuel, Daniel, and Tobias Walker executors of his will. [*233]

The father was eighty-five years of age when he died; and the bill alleges that the plaintiff, by reason of his having mortgaged his interest in the Sodbury estate to the amount of its value, had not, at the time of his father's death, and had not for some time before had, any means of support, except such as were and had been allowed him by his father: that he had never interfered in the management of his father's affairs and property; and it is, I think, proved, that at the time of and after his father's death, the plaintiff was in needy circumstances. It appears that he applied to his brothers for pecuniary assistance to enable him to stock the farm at Sodbury.

The plaintiff was discontented with the disposition made of the property of his father and mother, and after considerable negotiation, of which it is to be regretted that the full particulars do not appear, and some correspondence, which I shall have

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occasion to notice, it seems to have been agreed, that the Chilworth estate should be equally divided between the four brothers, and that the plaintiff, who was in want of money, should sell his share to the other three. On the 15th of October, 1841, the parties met at the office of Mr. Roberts to execute the deeds which he had prepared, and accordingly an indenture dated the 15th of October, 1841, and made between the plaintiff of the first part, Samuel Sturge and the defendants Daniel Sturge and Tobias Walker Sturge of the second part, and John Roberts of the third part, was executed by those parties. The deed recited the will of William Mill, and the marriage of Elizabeth Mill to Toby Walker
[*234] Sturge, and, after stating the parties of the first and *second parts to be the surviving children of the marriage, and that they had agreed, that the estate should be equally divided between them, and that the share of the plaintiff should be purchased by his brothers for 950*l.*, it was witnessed, that, in pursuance of the agreement, and in order to defeat all estates tail by virtue of the recited will, and to limit the inheritance in fee-simple to the uses therein mentioned, and in consideration of the sum of 950*l.*, paid as therein mentioned, the plaintiff, in pursuance of the statute therein mentioned, conveyed the estate to Roberts in fee, for the uses in equal thirds of Samuel Sturge and the defendants Daniel and Tobias Walker, as tenants in common.

This is the deed which the plaintiff seeks to set aside. He says that he executed it under a misapprehension of his right, and in the belief, that he was conveying only one-fourth part of the estate, and that he was not aware, that in consequence of no fine or recovery having been levied or suffered, he was entitled to the whole estate. He further alleges, that he executed the deed without having had proper legal advice; that the real facts of the case were not disclosed to him, and that he was at the time under the pressure of pecuniary difficulties.

It is to be observed, that the only title recited in the deed is the title derived under the will of W. Mill, and that the only consideration given to the plaintiff was the alleged value of one-fourth of the estate.

The defendants, not now denying that the plaintiff was entitled to the whole estate under the will of his grandfather W. Mill, insist, that he was perfectly aware of the nature of his right and claim,
[*235] executed the deed, with a full knowledge of its contents and *effect, and that it was a compromise of family differences, made after

due consideration, and with a full understanding of the case; and, in particular, they say, that on the 2nd of April, 1841, and almost immediately after the testator's death, the plaintiff required to see and was shown a copy, viz. the probate copy, of the will of W. Mill, and then insisted on his right to the whole estate under that will; and that on the 15th of October, 1841, the deed containing an accurate recital of the will of W. Mill was read over to him, and that he perfectly understood it. These allegations, if established, would be very material, and it is necessary to examine carefully the evidence in support of them which I have done.

As to the meeting of the 2nd of April, 1841, the only disinterested person who was present was the witness Levitt, who has been examined on both sides, but whose recollection is unfortunately so imperfect, that the important facts cannot be ascertained from his evidence. The documents which were material with reference to all the claims then subsisting were 1st. The will of W. Mill; 2nd. The settlement made on the marriage of Toby Walker Sturge and Elizabeth Mill; 3rd. The will of Elizabeth Sturge; and, 4th. The will of Toby Walker Sturge, and if any claim was made under the will of W. Mill, it was of the utmost importance to ascertain, whether, in contemplation of the marriage of Elizabeth Mill, or on any other occasion, a fine had been levied, or a recovery suffered of the devised estate. As to that, it does not appear that any enquiry had at that time been or was then made, and as to the documents, after repeatedly considering the evidence of Mr. Levitt, I find it impossible to collect from it, what were the documents produced or referred to, and, in particular, whether the *probate [*236] copy of the will of Mill was produced, as is alleged by the defendants, and if so, whether any question was raised upon its construction and effect, or any claim made under it; and, upon the evidence, I am of opinion, that it is not established, that in April, 1841, the plaintiff knew that he had any legal claim under the will of his grandfather W. Mill, and still less, that he then claimed the whole estate under that will.

On the 15th of October, 1841, at the meeting when the deed was executed, there were present the parties, the plaintiff, his brothers Daniel and Tobias Walker, and Mr. Roberts, and the attesting witnesses were Augustus Alexander and Mr. Johnson. Mr. Alexander states, that before the deed was executed, the draft was read over aloud by himself slowly and deliberately, and that whilst the same was so read, the deed was held by the plaintiff and one of

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his brothers, who attended to and followed the reading of the draft; but beyond that, he has no recollection of any explanation having been given to or required by the plaintiff of the contents, or effect of the deed.

I am of opinion, that this evidence does not, of itself, establish the fact, that the plaintiff did fully understand the effect of what he was doing. It does not show, that he understood or had the means of understanding the effect of the will which was recited in the deed, that he alone was at that time entitled to the estate tail by the will devised to his mother, or that he was then (without any consideration for more than a one-fourth part of the estate), conveying or about to convey away his exclusive right to the whole.

[237] Mr. Roberts has been examined as a witness for the plaintiff and for the defendants. In his evidence for the defendants he states, that shortly after the death of the father, and as it seems in April, 1841, the defendant Daniel consulted him with respect to a question, which, he says, had arisen between the plaintiff and his brothers, the question in dispute being, that the plaintiff claimed the whole of the estate at Chilworth, and his brothers disputed that claim, alleging that the estate ought to be equally divided.

It appears from this evidence (whether the plaintiff had made this claim or not), the defendant Daniel informed Mr. Roberts that he had; and we must understand from this, that Daniel knew, at least, that such a claim might be made, and he asked the opinion of Mr. Roberts upon it. Upon which occasion, Mr. Roberts cited to Daniel Sturge the cases of *Loddington* v. *Kyme* and *Doe* v. *Collins*. Mr. Roberts, though he had not at that time any copy of the will of W. Mill, yet being verbally informed of its contents, and apparently knowing the effect of the settlement, and of the wills of Mr. and Mrs. Sturge, expressed himself to the effect, that it appeared, in his opinion, doubtful, what (having regard to the intention of the testator), would be the legal construction put upon the will, such legal construction being, in his opinion, that the children of the daughter of Elizabeth Sturge should divide the estate between them. This being the opinion he expressed, he says, that Daniel Sturge told him that he communicated it to the plaintiff.

He then speaks of the occasion of the plaintiff's first calling upon him, with reference to the dispute between him and his brothers, and stating his claim to the whole of the estate, on the ground of

[*238] the whole of the estate *being given to W. Mill's daughter and her

issue. I regret that Mr. Roberts has not stated the time when the plaintiff first called upon him with reference to the dispute; the impression on my mind is that he refers to October, 1841, shortly before the execution of the deed. And he says, that he saw the plaintiff and the defendants at different times, and not together; and that, having regard to the intention of the testator (W. Mill), or to the intention or understanding of their father and mother, he advised the plaintiff and defendants, that it would be better to compromise the matter by settling among themselves, by reason that litigation was attended by expense. He says, that he fully discussed the question in dispute with the plaintiff alone, and then referred to and quoted the cases he had before mentioned. He is not aware that he said any thing about conflicting decisions; but he told the plaintiff what he conceived to be the intention of the testator. He from the first understood, that the defendants wished the estate to be divided equally amongst them all, which arrangement or proposal was, in his opinion, and having regard to the situation of the family, a fair and proper proposal or arrangement for the plaintiff to accept, as it appeared the best which the particular circumstances of the case admitted of. He says, that he advised the plaintiff to consult some other professional person respecting the construction of the will, and that two or three days afterwards the plaintiff told him that he had consulted other lawyers, and had made up his mind on the subject; and he then gave directions to prepare a deed, conveying all his interest in the estate, which he agreed to divide with his brothers, the consideration of such deed to be reserved.

It seems from this evidence, that the plaintiff had at least some opportunity of taking other advice on the *subject, and the deed having been read over, as Mr. Roberts states, which agrees with what is stated by Mr. Alexander, Mr. Roberts takes on himself to state, that the plaintiff fully understood it. But it does not appear, that, in fact, the plaintiff ever did consult any other professional person on the subject: it does not appear even that he had any proper means of taking advice on the construction of his grandfather's will; and it is clear that he had not any proper means of taking advice on the proposed deed; for Mr. Roberts states, on cross-examination, that the plaintiff never, to his knowledge or belief, obtained from him or applied for a draft or copy of the deed, and that he never promised or undertook to furnish him with a draft or copy of it. Whatever, therefore, might be the advice of

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Mr. Roberts as to consulting another professional person, it was clear that Mr. Roberts thought the plaintiff should be contented with such advice as could be taken upon his own knowledge and statement of the case, without reference to documents. Now in a case like this, I think it was the duty of the brothers, and of Mr. Roberts, who was their legal adviser, to see that the plaintiff, who was or (in regard to the doubts of Mr. Roberts) might be entitled to the whole estate, and who was called upon to alienate the whole for the alleged value of a fourth part, to take care that the plaintiff did clearly understand what his right was, and what he was doing. In the circumstances in which they were placed, I think it was the duty of the plaintiff's brothers and of Mr. Roberts, to see and be able to show, that the plaintiff did, in fact, receive and act upon independent advice as to his rights, and that he parted with his rights with knowledge and on deliberation. On considering the evidence of Mr. Roberts, in many places ambiguously expressed, I own that I am not satisfied from it that the plaintiff understood, or ever had communicated to *him, the true state of the case. He may have known the opinion of Roberts; and I collect from his evidence and his conduct, as stated by himself, that in his, Roberts's, opinion the wills of Elizabeth and Toby Walker Sturge were not legally operative; that the title to the property was that which was given by the will of William Mill, under which the surviving children of Elizabeth Sturge were entitled in equal shares; that such, at least, was the intention, but there was some doubt upon the legal construction. I make no remark upon this opinion; for, however strange and inconsistent with the documents and with the acts done it may seem, Mr. Roberts may have very innocently fallen into an error; and his mistake might not, by itself and in the absence of other circumstances, have made the deed invalid. He admits, however, that the legal operation of the will was, in his opinion, doubtful; and I do not find that this doubt, in that respect, which was communicated to the defendants, was ever communicated to the plaintiff. He says, in substance, that the plaintiff claiming the whole, but his brothers wishing an equal division, he, Mr. Roberts, thought it a fair proposal to comply with that wish, without securing to the plaintiff any compensation for the greater right to which (if Mr. Roberts's doubts were well founded) he was entitled.

[*240]

Having considered the effect of the evidence of Mr. Roberts, it is proper to look at the letters, which, before the date of the deed,

were written by the defendant Daniel to the plaintiff on the subject of his claims.

The statement now made by the defendants is, that the will of W. Mill was known to the plaintiff on the 2nd of April, 1841, and that the plaintiff then claimed to be entitled to the whole estate.

However this was, the plaintiff was dissatisfied with his position [241] after his father's death; and his brothers intimated an intention of doing what they could to satisfy him. They at least knew, that a question, which Mr. Roberts thought doubtful, arose upon the will of W. Mill. It does not appear that Mr. Roberts had any doubt that the estate did not pass by the will of Mrs. Sturge, but he had some doubt, whether all the surviving children were not entitled under the will of W. Mill. The question, according to the view of Mr. Roberts, as I collect it from his evidence and conduct, was, whether, in the absence of a fine or recovery, the estate belonged to the plaintiff as heir in tail, or passed by the limitation in the will to all the children, or rather the surviving children, of Elizabeth Sturge. We do not know all that passed between Mr. Roberts and the defendant Daniel; but on the 14th of April, 1841, the defendant Daniel Sturge wrote to the plaintiff as follows: "Since I returned home, I have been thinking we may defer coming down as we talked, as it was chiefly with a view to satisfy thee respecting reading will, &c.; all other business we can do when thee come to 75, where thee and I can consult together for the best; now as to the will and settlement, I thought there could be no objection to my reading it, and therefore went over to Tobias, and carefully perused the documents; and as the will does not at all relate to thee (being the sole excepting cause amply provided for, the eldest son for the time being), there is no occasion for me to bring it down so soon as intended, as thee may rest assured, nothing in it relating to thee would be kept back. The other documents are a confirmation of the will, having full power to dispose of the estates; but as Tobias can leave better than I can now, he will most likely come down early and endeavour to satisfy thee."

Considering what is represented to have been the state of the [242] case, this letter appears to me very extraordinary. It is said, that the plaintiff claimed the estate under the will of William Mill, which was well known to him; the letter refers to a will, which is said not to relate to the plaintiff at all, "being the sole excepting cause amply provided for, the eldest son for the time being." This odd expression, imperfect and inaccurate as it is, refers, I think, to the

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will of Mrs. Sturge, made in pursuance of the settlement giving full power to dispose of the estates; but no information is given respecting the will of William Mill, upon the construction of which Mr. Roberts was consulted; nor can it be collected from the letter, that the plaintiff knew of the will of William Mill, or at that time made any claim under it, or was aware that any question in which he was interested arose upon its construction. What followed immediately upon this letter does not appear; but a search which was made for a fine levied of the Chilworth estates was unsuccessful, a fact which does not seem to have been ever communicated to the plaintiff. Whatever the plaintiff's claim was, he was not satisfied by such information as he received; and a claim to stand under the will of his mother in the place of his sister Mrs. Sargeant, who died in his father's lifetime, was suggested. This claim is imputed to the plaintiff, but without evidence, by the defendant Daniel; and in a letter to the plaintiff, dated the 11th of June, 1841, Daniel expresses himself as follows: "I have been thinking the time is approaching, when we might confer together respecting this supposed claim to the exclusion of the Sargeants on Chilworth. I told them the other day thee did give me to understand, that their share would be thine; at all events, we should have to pay them or thee one fourth; and if we can agree amongst ourselves as to the value of [*243] one-fourth, *and have J. Roberts's decided opinion in thy favour, we could perhaps have deeds or papers prepared by him, and each of us take one share, and finally settle it by the time of the stocks opening, so as to pay thee by the time thee wanted it."

The last expression refers to the plaintiff's want of money, and his wish to obtain from his brother pecuniary assistance to stock his farm. Again, on the 27th of August, Daniel writes to the plaintiff as follows: "I received thine this morning, and am not aware of the repeated applications; thee will recollect I wrote thee in confidence some two months ago, on the subject pretty much, and I continue in the same mind; but if thee think of going into a disputation of the will and disputing Chilworth, then I have done, and no doubt we shall see it our duty to oppose thy plans, for I really begin to suspect thee are thinking of gaining more than thy fair share. It's useless for me to be applied to for help, as I have disposed of all my available funds, and if thee must have money to pay J. Bell" (who was a creditor of the plaintiff), "then I think we might agree to settle the business, if thee intend to come in instead of the Sargeant's; but I really know of no paper of any use

to thee, and thee have heard J. Roberts's opinion upon it, and the only chance I see is, for thee to join and get J. Roberts to divide the estate by the usual deeds, and then we will pay thee a full share; but thee cannot expect me to prop this forward, seeing it upsets the Sargeant's claim; but I see thee are willing to get money and keep this overhead. I must speak my mind freely; I do say that we should expend all our shares, rather than allow mother's will, as regards us, to be set aside. But this between me and thee only now, and I do say, that I shall consider it my place to make a stand. Nevertheless, I will forward thy views, if on a reasonable *term. I am sure that paper is of no use to either of us, and I could not find from J. Roberts that it would avail thee. If the point is disputed, some years will elapse in the settlement I am sure, and I am anxious for thee to do the best with the land; but I shall not say any thing to Samuel or Tobias on this subject at present." This letter has a postscript, in which Daniel says, "Thee will see I feel bound to write thee as above as one of the executors." [*244]

These letters do not appear to me to contain any expressions, from which it can reasonably be inferred, that the real nature of the case, and the opinion of Mr. Roberts thereon, had been fairly disclosed to the plaintiff in the letter of the 27th of August. The defendant Daniel expresses himself as if he had then, for the first time, not discovered, but begun to suspect, that the plaintiff was making claim to more than his fair share of the estate; and instead of giving the plaintiff the information which ought to have been given, expressions are used, which (whether intentionally or not) were, in fact, calculated to mislead him, to make him believe his only chance of getting any thing was to claim only a share as friend of the Sargeants; that the only persons interested to oppose the only plausible claim that he had were the Sargeants; and that it was the same thing to his brothers, whether he succeeded or not: that they were, in fact, disinterested, which they clearly were not.

Under all these circumstances, I am of opinion, that the deed of October, 1841, cannot stand as against the plaintiff. I think that the plaintiff did not know his right to the whole of this estate, and although a mistake in that respect might not alone have made the deed invalid, yet, in the absence of a full and free disclosure *to the plaintiff of all the material facts and circumstances which were known to his brothers, and with so much reason to think that the plaintiff was actually misled, I am of opinion, that a deed [*245]

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obtained from him without adequate consideration, when he was under pressure for want of money, ignorant of his rights, and either without legal advice, or with advice meant to promote the wishes and the interest of those with whom he was dealing, cannot be sanctioned by the Court; and I think, that, in strictness, and so far as it can with justice to others, the deed might be set aside, and the plaintiff be held entitled to have the estates reconveyed to him, he accounting for the 950*l.* which he received with interest. But it appears, that the estate or some considerable part of it has been sold, and the plaintiff by his bill prays, that he may be at liberty to elect to take the purchase-monies in lieu of the parts of the estate which have been sold; and at the hearing, I understood, that he was willing to take the purchase-money and confirm the purchases; and if that be the case, the decree will be to take an account of the purchase-monies received, and for payment of the balance, after deducting the 950*l.*

I am of opinion that the costs of the suit must be paid by the defendants Daniel and Tobias Walker Sturge; and, if it cannot be otherwise arranged, the plaintiff must pay the costs of the other defendants, and having them over against the defendants first named.

NOTE.—An appeal to the Lord Chancellor is now pending. [No report of this appeal can be found.]

1849. *Nov.* 5, 6.

Rolls Court. Lord LANGDALE, M.R.

[252]

BROWN *v.* OAKSHOTT (1).

(12 Beav. 252—253.)

Case and opinion submitted and taken by trustees in contemplation of litigation, held privileged as against the cestuis que trust.

THIS was a motion, made on behalf of parties beneficially interested, for a receiver and manager of a brewery, carried on by executors and trustees, and also for the usual order for production of documents.

As to the production, the defendants admitted they were trustees and executors, and said, that they had stated a case for the opinion of counsel. With respect to this, the answer contained the following passage: "And these defendants say, that the statement mentioned in the schedule as submitted to counsel in the month of

(1) *Talbot* v. *Marshfield* (1865) 2 Dr. & Sm. 549; *In re Mason* (1883) 22 Ch. D. 609, 52 L. J. Ch. 478, 48 L. T. 631.

November, 1848, was so submitted and his opinion thereon taken in contemplation of the present litigation;" and they submit, "that the said case and opinion are privileged and ought not to be produced."

Mr. Rogers, in support of the motion:

If the defendants had stated, that they had taken this opinion for their own personal guidance, and that it had been paid for out of their own funds, the case and opinion might perhaps have been considered privileged; but being taken by parties holding a fiduciary character, at the expense of the estate, their cestuis que trust, to whom they belong, ought to be allowed to inspect them. There can be no valid reason for concealing them from the parties interested.

Mr. Turner appeared on the motion for the trustees and executors, and

Mr. Foster, *Mr. Godfrey*, *Mr. Briggs*, and *Mr. Stinton* for other defendants. [253]

THE MASTER OF THE ROLLS, without hearing the defendants, said:

I do not know what motive the defendants may have for not permitting an inspection; but if they refuse to produce them, I think they have a right to do so.

ROBERTSON *v.* SKELTON (1).

(12 Beav. 260—268; S. C. 19 L. J. Ch. 140; 13 Beav. 91.)

1849.
May 7, 23, 24.
Nov. 6.

Rolls Court.
Lord LANGDALE, M.R.
[260]

A purchaser from the Court is in equity the owner from the order confirming the report, and any deterioration of the property arising from accident or by fire, without the default of the vendor, falls upon the purchaser.

If, between the contract and conveyance, a loss arises by accident, which brings with it legal obligation, which must be immediately satisfied, the expense incurred by the vendors is payable by the purchaser.

After the confirmation of the report, a part of the premises fell down and damaged the neighbouring property, the owner of which threatened to bring an action, and the remainder was ruinous and dangerous to the public. The vendor having reinstated and repaired the premises, the COURT held, that the purchaser was bound to indemnify him, and on petition, ordered a reference to ascertain the expenses properly incurred.

IN July, 1846, two houses were sold by auction, in a creditors' suit, and were purchased by Higinbotham. By the conditions of

(1) *Rayner* v. *Preston* (1881) 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. 787.

ROBERTSON v. SKELTON.

sale, he was to get the report confirmed before the 8th of August, 1846, and pay his purchase money into Court before the 12th of November, 1846, and be let into possession as from the 29th of September, 1846.

In consequence of the purchaser's default, the plaintiff, on the 20th of April, 1847, obtained an order to confirm absolutely the Master's report of the best purchaser.

In June, 1847, on an application by the plaintiff to have the purchase money paid into Court, a reference was made to the Master, to enquire whether a good title could be made.

In July following, the vendor being in possession, a part of the property fell down and damaged the adjoining property, the owner of which threatened to bring an action. The other parts of the premises were ruinous and dangerous to the public.

The plaintiff petitioned for a reference to the Master to ascertain
[*261] what was proper to be done; but Higinbotham, *though served with the petition, declined being a party to the reference, and obtained his costs of the proceeding.

The Master reported that the damage done to the neighbouring premises should be repaired, and that part of the premises should be shored up, and certain repairs done to the premises, in order to render them habitable and retain the tenants. The report being confirmed, the proposed repairs &c. were done at an expense of 62*l.*, and the costs of the proceeding amounted to 118*l.*

The Master having, in March, 1849, reported, that a good title could be made, a petition was now presented by the plaintiff, praying that the purchaser might pay his purchase money, with interest from the 12th of November, 1846, and the amount paid for repairs and costs, and that the receiver might pay him the rents from the 29th of September, 1846, and let him into possession.

The only point now argued was, as to the liability of the purchaser to pay the sums expended in repairs and costs.

Mr. Martindale, in support of the petition:

In equity, an estate agreed to be purchased is considered the estate of the purchaser from the time of the contract, and the purchase money from that time is held to belong to the vendor (1).

"The consequence is, that if, after the contract, the estate be
[*262] improved in the interval; or if the value be *lessened, by the failure of tenants or otherwise, and no fault on either side, the

(1) *Harford* v. *Purrier*, 16 R. R. 260 (1 Madd. 538).

vendee has the benefit or sustains the loss. If there be a loss by fire, after the contract and before the completion of it, and neither party is in fault, the loss falls upon the vendee, as was held in *Paine* v. *Meller* (1). * * *

Here, the report was confirmed before the accident, and from the time of the confirmation, at least, the contract was complete: *Ex parte Minor* (2). * * *

Where a vendor is bound to keep up an embankment, or to keep [263] in repair, or to perform other covenants in respect of the property, he must, for his own protection, perform those duties, in the interval between the contract and conveyance, if the vendee will not do so. The vendor remaining legally liable, is not to expose himself to actions at the suit of third parties, or indictments, by neglecting to perform his obligations to third parties and his duty to the public.

Performing those duties, the vendee must indemnify him against all the damages and expenses sustained by him, including the costs occasioned by the purchaser's not concurring in the necessary arrangements. * * *

Mr. Steere, contrà, for the purchaser:

This is a case of pure waste on the part of the vendor, and differs from the cases of fire and accidental damage.

* * * * *

Mr. Martindale, in reply, did not ask the costs of the reference [264] as to title.

THE MASTER OF THE ROLLS: [265]

I will look at the authorities, to see the principle to be deduced from them.

THE MASTER OF THE ROLLS: *Nov.* 6.

On the 20th of April, 1847, an order was made to confirm absolutely the Master's report, finding Mr. Higinbotham to be the purchaser of the property, to which a good title was afterwards made.

By the established rule of the Court, the purchaser is to be considered, in equity, as the owner of the estate, from the date of the order confirming the report; and any deterioration of the property arising from accident, as by fire, without the fault of the vendor, falls upon the purchaser.

(1) 5 R. R. 327 (6 Ves. 349). (2) 8 R. R. 247 (11 Ves. 559).

ROBERTSON v. SKELTON.

In the month of July following the date of the order, a part of the property fell down, and if that had been all, the loss would, in this case, have fallen upon the purchaser.

But the falling of a wall did injury to the adjoining property of Mrs. Hutchinson, and the injury to her continued, and could not but continue, so long as the rubbish which had fallen on her premises was allowed to remain. Moreover, a part of the property which had not actually fallen had become ruinous and was dangerous to the public (1).

The vendor, being in the possession of the property, was liable to actions and indictments for the injuries done and impending.

[*266] He was, by reason of his possession, *under legal obligations to compensate, remove, and obviate the injuries done, continuing and impending, and being under such obligations, he expended money in satisfying them. One of the objects of this petition is to obtain an order that the purchaser may repay that money.

There is no complaint as to the state of the property at the time of the sale, or at the time when the purchase was confirmed; and it is not alleged, that the completion of the purchase was in any manner delayed by the vendor. For any thing which appears to the contrary, the state of the property was known to both parties equally; and if it had not been for the neglect or delay of the purchaser, he might have had possession of the property at the time appointed by the conditions of sale, viz.: in November, 1846.

In equity, the estate belongs to the purchaser from the date of the order to confirm the report, and the right to possession belongs to the vendor, till the purchase money, for which it is security, is paid.

The right of possession is accompanied by the obligation to account for the rents received; but notwithstanding the existence of this right to possession, it cannot be said to be accompanied by all the duties and liabilities usually annexed to the possession, as a loss occasioned by accident, as by fire, falls upon the purchaser.

I am not aware that the cases have gone further than to determine, that the purchaser is to bear the loss occasioned by the deterioration of the purchased property; but if the accident by which the loss arose brings with it legal obligations, which must

[*267] be immediately satisfied, *and cannot be satisfied without incurring expense, it appears to me that the case falls within the same principle, and that the expense so incurred ought to be repaid by the

(1) Metropolitan Buildings Act, 7 & 8 Vict. c. 84, s. 40 [rep. 18 & 19 Vict. c. 122, s. 109; see now 57 & 58 Vict. c. ccxiii.].

purchaser, in respect of whose property and the accidents befalling it the obligation was incurred.

The plaintiff, in this case, holding a representative character, very properly considering that it would not be safe for him to incur the expense without the sanction of the Court, obtained a reference to the Master to inquire into the subject; the purchaser declined to be any party to the reference, and the report was consequently made in his absence; but as far as the testator's estate was concerned, it has been found that the sum of 51*l.* 10*s.* was an expense proper to be incurred for the purposes in his report mentioned, being, substantially, the purposes necessary to satisfy the obligations occasioned by the accident, and to the amount of them I think ought to be added the fee of 2*l.* 2*s.* allowed to the district surveyor.

The other costs which are prayed by this petition seem to me to be costs incurred for the protection of the testator's estate, or of the persons responsible for its due application. The costs of the order of the 16th September, 1847, the charges of the surveyor employed by the receiver, and the fee to the solicitor of Mrs. Hutchinson, were costs and expenses which I may conclude to have been properly incurred for the protection of the trustees; but it does not appear to me that they are properly chargeable against the purchaser. Nor do I think that the purchaser is bound by the Master's report to admit, that the sum of 51*l.* 10*s.* thereby authorised, or the sum of 2*l.* 2*s.*, which was paid to the district surveyor, was properly payable. *If he desires further investigation, I think him entitled to it. [*268]

There must be an order for payment of the purchase money with interest, as prayed, and an order for an account of rents. If the purchaser desires an account of the expenses properly incurred and paid in respect of the purchased property, by reason of the accident which occurred in July, 1846, that inquiry must be made before any order is made for payment of the rent; but if he is willing to admit the payment of 51*l.* 10*s.* and 2*l.* 2*s.*, I will direct the amount to be deducted from the rent payable to him, and the rent to be paid.

Both parties being, as I think, in part wrong, I shall give no costs of this petition improperly incurred.

The costs of the inquiry, if taken, to be reserved (1).

(1) The case is reported on another point, p. 121, below.

1849.
Dec. 13.

Rolls Court.
Lord
LANGDALE,
M.R.

LOMAX *v.* LOMAX (1).

(12 Beav. 285—292; S. C. 19 L. J. Ch. 137; 13 Jur. 1064.)

A testator gave several life annuities, one of which was (expressed in the alternative) either 10*l.* a year or 5*l.* and a tenement (part of the N. estate), and he charged them all on the N. estate: Held, that all the annuities were charged exclusively on that estate.

[285]

THE testator, Edmund Lomax, had three daughters, Hester, Frances, and Laura. He was possessed of three estates, viz., Netley, Parkhurst, and Sanhurst, with Shoes and Bullcross, besides others, which it is unnecessary to name.

By his will, made in 1846, he directed his executors, "as soon as conveniently might be after his death, to pay, out of monies which might then be in the hands of his bankers, so far as the same might extend, and by sale of agricultural stock and produce, all his funeral expenses and just debts, except a mortgage debt thereinafter otherwise provided for."

He then devised his estate called Netley to his daughter Hester for life, with divers remainders over.

He next devised his estate called Parkhurst to his daughter Frances, with divers remainders over.

He then devised his estate Sanhurst, with Shoes and Bullcross, to his daughter Laura for life, with divers remainders over.

* * * * *

[290] The testator "bequeathed to James Passons, in consequence of his long service to his father, 10*l.* a year, or five pounds and his tenement at the lodge, rent free, for his life." He then bequeathed four other life annuities of small amounts, and he proceeded: "And I hereby charge the said estate of Netley, bequeathed as aforesaid, to my daughter Mrs. F. (Hester), with the payment of the said annuities."

[291] The tenement at the lodge referred to was part of the Netley estate.

Mr. Turner and *Mr. Bayley*, and *Mr. Roupell*, and *Mr. Giffard* contended, that the annuities were exclusively charged on the Netley estate; for the option given to Passons to take the lodge (or part of the estate) in lieu of part of the annuity, showed, that the estate was intended to bear the burthen, and that the other annuities, all of which were charged on the estate, followed the same rule as that which governed the annuity with which they

(1) *In re Trenchard* [1905] 1 Ch. 82, 74 L. J. Ch. 135, 92 L. T. 265.

were associated. In *Lamphier* v. *Despard* (1), a testator, by his will, directed that his debts and legacies should be paid by his brother, whom he appointed his executor and residuary legatee. He then charged two legacies given by his will, on the timber growing on his estate of Finane, and bequeathed that timber to the same brother: it was held, that the general personal estate of the testator was exonerated from the payment of those legacies. They also cited *Jennings* v. *Looks* (2).

Mr. Prendergast, contrà, contended, that these were mere bequests payable, in the first instance, out of the personal estate, and charged in aid on the Netley estate.

THE MASTER OF THE ROLLS:

Though, on this point, there is more doubt, my decision is still in favour of the plaintiff. Here annuities are given and are charged upon the Netley estate: I am much inclined to think that, if this were simply a general gift of annuities, the mere charge would not have *exonerated the personal estate; but the first legacy is so [*292] expressed, that it might, in one event, be a devise of a portion of the Netley estate itself; and it is so connected with the other annuities, that I am of opinion that they are all charged exclusively upon the Netley estate. There is rather more doubt on this than on the former question; but I think that this is the proper conclusion to come to upon it.

RANKEN *v.* THE EAST AND WEST INDIA DOCKS &c. RAILWAY COMPANY.

1849. *Dec.* 19.

(12 Beav. 298—306; S. C. 19 L. J. Ch. 153; 14 Jur. 7.)

Rolls Court. Lord LANGDALE, M.R. [298]

Some property was mortgaged to the plaintiffs, who were not bound to receive their money until a future day. A Railway Company with knowledge, treated with the mortgagor alone, and, not agreeing, paid into Court, to the credit of the mortgagor, the amount of compensation, but made no provision for the compensation to the mortgagees under the Lands Clauses Consolidation Act, 1845, s. 114. The Company then took possession, and commenced pulling down the building. The COURT restrained the Company from proceeding, until the value of the mortgagees' interests had been ascertained and paid or secured.

IN 1848, R. B. Hardy, being entitled to some property in the line of the above railway, for the residue of a term of ninety-six

(1) 59 R. R. 641 (2 Dr. & War. 59). (2) 2 P. Wms. 276.

RANKEN v. THE EAST AND WEST INDIA DOCKS &C. RAILWAY COMPANY.

years, by an indenture dated 10th of March, 1848, mortgaged it to the plaintiffs Ranken and Ingles, to secure 700*l.* with interest at five per cent. The mortgage deed contained a proviso, that if Hardy duly paid the interest and the ground rent, and performed the covenants in the lease, the plaintiffs "should not, nor would, require payment of the principal money until the 5th of March, 1851," nor institute any proceedings to enforce the payment, or obtain possession, or foreclose; and if the 700*l.* and interest should not be paid on the 10th of March, 1849, it should not be lawful for Hardy "to oblige or compel the plaintiffs," &c. "to receive and take the principal sum of 700*l.* &c. before the 10th of March, 1851."

The defendants were enabled by their Act (1) to make a railway from the East and West India Docks to join the London and Birmingham Railway, and "The Lands Clauses Consolidation Act, 1845," was incorporated into the special Act.

On the 16th of February, 1849, the Company gave notice to [*299] Hardy that they required to purchase the *property and were willing to treat for the purchase, and they demanded the particulars of his estate and claims.

On the 9th of March, 1849, Hardy sent in his claim, value 1,365*l.*, compensation 170*l.*; and he thereby also stated, that the property was in mortgage to the plaintiffs.

The defendants proceeded to treat with Hardy alone, and sent an agreement for his approval, which was not executed.

On the 3rd of July, 1849, Hardy's solicitor wrote to the Company as follows: "Mr. Hardy, as you are aware, is not in a position to sell the property free from incumbrances; and if your clients wish the negociation to be continued and to purchase the property, they must, at once, make arrangements with the mortgagees, who, according to the terms of the mortgage deed, cannot be compelled to take their money before the expiration of three years from the date of the mortgage deed. The mortgagees are also clients of mine, and will, I dare say, be ready to treat with the Company as to their interest, if proper terms are offered, but much will of course depend upon the nature of the offer. I must however give your Company (through you as their solicitor) notice, that if any attempt be made to take possession of the property, my clients, as well mortgagor as mortgagees, will forthwith adopt such measures as they may be advised against the Company."

(1) 9 & 10 Vict. c. cccxcvi.

No answer was given to this by the Company, but on the 17th of November, 1849, they paid 1,080*l.* into Court to the credit of Hardy, "the same being," as they stated, "the value of Hardy" in the premises, and for compensation as determined by a surveyor appointed by a *magistrate. They also sent to Hardy a bond of the Company with two sureties, conditioned for the payment to Hardy, or the deposit in the Bank, for the benefit of the parties interested in the land, of all such purchase or compensation money as should, in manner provided in "The Lands Clauses Consolidation Act, 1845," be determined to be payable by the Company in respect of the estate. [*300]

On the 3rd of December, 1849, the defendants took possession of the property, and commenced pulling down the buildings thereon.

The interest of the mortgage had been regularly paid.

The plaintiffs thereupon filed this bill against the Company, and now moved for an injunction, to restrain the defendants "keeping possession" of the premises, and from pulling down the messuages thereon, and from prosecuting the works of the railway upon the land, until the value of the plaintiffs' rights and interests therein had been ascertained, and payment thereof made or secured according to the Act.

Mr. Turner and *Mr. Glasse*, in support of the motion:

The Company, with knowledge of the mortgage, have thought proper to deal with the mortgagor alone, and have not made such a proper provision for the rights and interests of the mortgagees, as to entitle them to take possession of the property, and destroy or deteriorate the plaintiffs' security. The mortgage is not payable until the 10th of March, 1851, and by the 114th section of the 8 & 9 Vict. c. 18, if the mortgagee is required to accept payment of his mortgage money at a time earlier than the time by the mortgage deed limited, he is *entitled to the costs and expenses incidental to the reinvestment of the sum so paid off, and also to "compensation, in respect of the loss to be sustained by him by reason of his mortgage money being so prematurely paid off," and "until payment or tender of such compensation as aforesaid, the promoters of the undertaking shall not be entitled, as against such mortgagee, to possession of the mortgaged lands under the provision thereinbefore contained." [*301]

Here there has been no requirement, no payment, tender, or

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security of the costs and compensation, and the defendants are not, therefore, entitled to possession.

The investment has been improperly made in the name of the mortgagor alone, and a bond given to him and not to the mortgagees.

Mr. Walpole and *Mr. Hetherington* for the Company:

* * The mortgagees must be paid out of the money deposited in Court, which is a sufficient protection and is amply sufficient to pay every thing they can claim. Under the mortgage deed, the mortgagees are not entitled to take possession, and therefore have no right to interfere with the possession as between the mortgagor and the Company, and the Company have the right to redeem under the 108th section.

The 114th section, which is so much relied on, does not over-rule the previous provisions in the statute.

[302] The Court, seeing that there is a sufficient sum deposited to secure all the claims of the plaintiffs, and that no injury can arise, ought not to interfere by injunction so as to stop the completion of the line of railway: *Willey* v. *The South-Eastern Railway Company* (1).

Mr. Turner, in reply:

Although the plaintiffs are not entitled to possession, they have a right to prevent any waste being committed on the property, to the detriment of their security. When the house has been pulled down, the value of the property will be comparatively destroyed. The Company have taken the plaintiffs' real security, without giving them either the bond or the benefit of the deposit, and the deposit neither includes the damage to the mortgagees nor the costs of the re-investment.

THE MASTER OF THE ROLLS:

It would be very much to the advantage of both parties if they would come to an arrangement as to this matter; but if they require my opinion, I am bound to give it.

This mortgage contains this provision: that upon the interest &c. being duly paid, the plaintiffs shall not require payment of the principal until the 10th of March, 1851, nor take any proceedings to obtain possession of the premises.

The interest having hitherto been duly paid, it is clear that the

(1) 84 R. R. 3 (1 Mac. & G. 58).

mortgagees have no right to take any *proceedings to obtain possession. The Railway Company, in the course of their proceedings, knowing that there was a mortgage, have thought fit, under the powers given to them by the Act of Parliament, to treat with the mortgagor and the party in possession, without any regard to the mortgagees. I am not prepared to say, that they had not a right to do so; but exercising that right, they must be subject to all the consequences which may arise from their neglecting to do something else, which may be requisite to entitle them to obtain possession or to deal with this property as their own. [*303]

They endeavoured to come to an agreement with the mortgagor, which I conceive they had a perfect right to do, but they neglected their own interest, by doing so, without taking some care that the mortgagees' rights were provided for. They had a perfect right to deal with the mortgagor, and they might have required the mortgagor to settle matters between him and the mortgagees. But it appears, that, knowing there was a mortgage, they neglected altogether to have any communication with the mortgagees. In consequence of this, the mortgagor, it seems, declined to come to an agreement with the Company, or delayed it so long, that they thought fit to proceed independently of both, and as they say, under the 8 Vict. c. 18, s. 85; and having ascertained, in the manner mentioned in the affidavits, the value of the land, they paid into Court, not to the account of the mortgagees, but to the account of the mortgagor, a sum of money which they conceived they had, by such proceedings, ascertained to be the value of the land. The mortgagees, finding their interest altogether neglected, and that the Company had actually taken possession, have filed this bill; and what they now desire is, that the Railway Company, who are in possession, should be prevented from dealing *with the land in any such manner as to lessen their security. [*304]

True it is, that the plaintiffs have no right to take possession now, nor so long as the interest is paid; but they have a right to the security of the land, and to have the value of the land protected against the acts of other persons with whom they have had no communication respecting their interest.

What does the Act of Parliament (1) say on this? I pass over the cases of common mortgages, and I take only this particular case, which is this: where there is in the mortgage deed a time limited for the payment of the principal money thereby secured.

(1) 8 Vict. c. 18, s. 114.

RANKEN v. THE EAST AND WEST INDIA DOCKS &C. RAILWAY COMPANY.

That being the case, if a "mortgagee shall have been required to accept payment of his mortgage money &c., at a time earlier than the time so limited" (which he has not been), "the promoters of the undertaking shall pay to such mortgagee, in addition to the sum which shall have been so paid off, all such costs and expenses as shall be incurred by such mortgagee in respect of or which shall be incidental to the reinvestment of the sum so paid off, such costs in case of difference to be taxed and payment thereof enforced in the manner herein provided with respect to the costs of conveyances; and if the rate of interest secured by such mortgage be higher, than at the time of the same being so paid off can reasonably be expected to be obtained on reinvesting the same, regard being had to the then current rate of interest, such mortgagee shall be entitled to receive from the promoters of the undertaking, in addition to the principal and interest hereinbefore provided for, compensation in respect of the loss to be sustained by him by reason of his mortgage money being so prematurely paid off, the [*305] *amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation."

I do not find that anything of the sort has been done or attempted. No treaty has been entered into, no offer to pay what shall be expended in reinvestment, no attempt to ascertain what is due for compensation, in consequence of the difference between the interest to be received when the reinvestment is made, and the interest which is reserved by the mortgage deed.

Then comes the final clause in this section, which says: "And until payment or tender of such compensation as aforesaid, the promoters of the undertaking shall not be entitled, as against such mortgagee, to possession of the mortgaged lands under the provision hereinbefore contained."

I have never read any clause in these Acts of Parliament less ambiguous. The Act forbidding them to do this, what has been done? The Company has paid into Court, in the name of the mortgagor, a sum of money equal, as they say, to the value of the land, providing nothing for the expense of reinvestment, nothing for any other costs, and nothing for compensation in respect of the difference of interest. I am clearly of opinion that this possession was wrongfully taken, and I think I shall not be acting contrary to what this Court has done in previous cases, if I grant an injunction to prevent the Company from dealing with the land, as they intend to do, for their own purposes.

I remember a case before Lord Cottenham, in which a bill was filed to prevent a bridge being made over a poor man's cottage. It was no sooner known that an application was to be made to the Court, than the Company built the bridge in the course of the night, and when the motion was made the next morning, they *said, "You are too late, the bridge is built, and the Court cannot interfere;" but his Lordship replied, "though I cannot prevent you from building the bridge, as it is built, still I can grant an injunction to prevent you using it;" he did grant the injunction, and the poor man had his compensation in a week. This Court is not prevented by the fact of possession from moulding its orders in such a manner that justice may be done. [*306]

As I am called on to decide this most foolish contest, I cannot refuse to compel obedience to an Act of Parliament, which seems perfectly plain. There are means of doing so; and to talk of a fund being in Court, which is the exact amount of the land, without anything to answer the costs of reinvestment and the other costs, and which is not even standing to the credit of the persons entitled to it, is a mere mockery.

I am surprised at the defendants by their affidavits telling the Court, that the course they have adopted is in accordance with the usage of Railway Companies, and that the like has been done by such Companies on other occasions. To introduce such statements into an affidavit for the purpose of influencing the judgment of the Court in a matter of this kind is a gratuitous absurdity, for an injustice is not to be tolerated in any case, merely because such things have been done by other persons on former occasions.

The plaintiffs are entitled to an injunction to restrain the Company from prosecuting the works of the railway upon the premises mortgaged, until the value of the plaintiffs' interests have been ascertained, and the amount paid or secured in manner required by the Acts of Parliament.

1849.
Dec. 20.

Rolls Court.
Lord LANGDALE, M.R.
[307]

IN RE HAIGH (1).

(12 Beav. 307—310; S. C. 19 L. J. Ch. 79; 14 Jur. 340.)

A payment for legacy-duty made by a solicitor for his client, ought, for taxation, to be included in his cash account and not in his bill of costs, and therefore such a payment is not to enter into the computation, in considering whether a sixth is taxed off.

MR. WILSON (an administrator) employed Mr. Haigh as his solicitor, to pass the administration accounts. Mr. Haigh passed them, and paid four sums, amounting to 11*l.* 8*s.* 6*d.*, at the Stamp Office for legacy-duty, in procuring the stamp to be impressed on the proper documents.

His bill, including the legacy-duty, amounted to 24*l.* 2*s.* 11*d.* It was referred for taxation, when the taxing Master, on a reconsideration, struck out the charge for legacy-duty, as a professional disbursement, but allowed it as a cash payment, thus reducing the bill to 12*l.* 14*s.* 5*d.*, which he taxed at 8*l.* 19*s.* 9*d.* The amount thus taxed off, being 3*l.* 14*s.* 8*d.*, was more than a sixth of the 12*l.* 14*s.* 5*d.*, but less than a sixth of the original bill of 24*l.* 2*s.* 11*d.* The Master having allowed the client his costs of taxation, the solicitor presented this petition, insisting that the Master ought not to have struck the item for legacy-duty out of the bill, and that therefore the solicitor was entitled to the costs of the taxation.

One of the affidavits stated, that it was customary for solicitors to charge legacy-duty in their bills of costs and not in the cash accounts, unless specific remittances were made in respect of such payments. An affidavit on the other side stated, that it was usual for clients in the country to remit the legacy-duty, and that such payments were only made by solicitors when specially requested,
[*308] (they not being payments they are *expected to make in the ordinary course of business,) and that in both instances, they were entered in the cash accounts and not in the bills of costs, "unless the duty amounted to no more than 20*s.* or thereabouts."

Mr. Turner and *Mr. Karslake* in support of the petition:

* * Stamp duties on conveyances or mortgages are properly introduced into a solicitor's bill of fees and disbursements (2), because the solicitor is responsible for the proper stamp being affixed, and can recover no more than is properly paid by him.

(1) *In re Kingdon* and *Wilson* [1902] 2 Ch. 242, 71 L. J. Ch. 604, 86 L. T. 639, C.A.

(2) See *In re Remnant*, 83 R. R. at p. 274 (11 Beav. p. 612).

The same reason is applicable to affixing the stamp on a legacy receipt or on letters of administration. In re HAIGH.

[They cited *Harrison* v. *Ward* (1) and other cases, to which reference is no longer necessary.]

Mr. Prior, contrà, referred to *Re Remnant* (2), but was stopped by the COURT.

THE MASTER OF THE ROLLS: [309]

It would be satisfactory if this and the former case were taken before a higher authority, so as to lead to a final decision, and to leave no further question on the point.

It is said that this is a hard case upon the solicitor, but it is to be recollected, that it has not been decided that the disbursements are not to be paid by the client; on the contrary, it is clear that the client is bound to repay that which the solicitor has disbursed. The only question is one which never arises, except in a case where the solicitor having charged more than one-sixth, in excess, for real professional services, the question arises, whether he is to bear the costs of the taxation. The struggle then is to include this sort of disbursement in his bill of costs, in order to increase its amount, and thus diminish the proportion struck off in taxation. The amount taxed off may be more than a sixth of the strictly professional charges, but a great deal less if you include in the bill these cash payments. No doubt both the bill and the disbursements are to be paid, but the costs of taxation, under the Act of Parliament, depend on whether this item is to be included in the bill or in the cash account.

So far as any rule can be collected from the cases, (admitting that they are not consistent in themselves, or in the reasons assigned for the conclusion), and from the certificate of the taxing Masters, as to the usage and custom of the profession, I think I ought to consider, that these payments for legacy-duty are mere disbursements, made for the client by the solicitor, in the character of agent and not of solicitor, and I believe it will be found to be the more usual practice of solicitors to enter them in their cash book and not in their bill *book. I must, therefore, decide that [*310] the certificate of the taxing Master is right.

In *Re Remnant* I ultimately came to a conclusion quite opposed to my first impression, after taking pains to leave no case unexamined.

No costs.

(1) 46 R. R. 808 (4 Dowl. P. C. 39). (2) 83 R. R. 269 (11 Beav. 603).

1849.
Dec. 21.

Rolls Court.
Lord
LANGDALE,
M.R.
[310]

DOUGLAS *v.* ANDREWS (1).

(12 Beav. 310—311; S. C. 19 L. J. Ch. 69; 14 Jur. 73.)

After the death of their father, infants petitioned for an allowance for maintenance out of their fortunes: Held that such maintenance was to be determined irrespective of the means of their mother to support them out of her own fortune.

In 1843, Sir Robert Andrews Douglas died, leaving his widow Dame Martha Elizabeth Douglas and three infant children him surviving. The children were still infants, and the widow unmarried, and both the widow and children had fortunes of their own.

A petition was presented in these suits, for a reference to the Master to approve of a proper allowance for the maintenance and education of the infants during their minority. The petition also prayed a reference to ascertain "whether Dame Martha Elizabeth Douglas (their mother) was of sufficient ability to maintain and educate the petitioners, regard being had to their rank in life, and their present fortunes and expectations." This part only was objected to by the widow.

Mr. Turner and *Mr. Busk* in support of the petition:

The mother is under a natural obligation to support her children, and their fortune is not to be broken in upon whilst the mother is of sufficient ability to maintain them. The same rule is applicable as well to a mother as to a father.

[311] *Mr. Roupell, contrà*, for the mother:

There is no authority for such a reference. The rule applies only to the father of an infant, and not to the mother.

The Master of the Rolls:

I never knew of such a reference. The rule is, that however large a child's fortune may be, whilst the father is of ability to maintain the child, he must perform his duty, and no part of the child's fortune is to be applied for that purpose.

I have never heard that the rule applied to the mother, and I will not make an order so contrary to all rule, without an absolute authority for it.

The order was made, omitting the reference objected to.

(1) *In re Bryant* [1894] 1 Ch. 324, 63 L. J. Ch. 197, 70 L. T. 301.

IN RE WILLIAMS (1).

1849.
Dec. 21, 22.

(12 Beav. 317—322; S. C. 19 L. J. Ch. 46; 13 Jur. 110.)

Rolls Court.
Lord
LANGDALE,
M.R.

Construction of a gift over upon death before becoming entitled to payment.

Personalty was settled by deed upon parents successively for life, with remainder to all their children equally, the shares to be paid at twenty-one or marriage, unless in the lifetime of the parents, in which case, payment was to be made on the death of the survivor. There was a gift over on the death of a child before becoming entitled to payment. A child attained twenty-one, but died in the lifetime of her parents: Held, that the gift over did not take effect.

[317]

ANN WILLIAMS, having a power to appoint a fund, executed a deed dated in 1823, whereby she appointed, that the trustee should stand possessed of 6,000*l.* Consols, after her death, in trust for Susanna Mills for life, and, after her decease, in trust for her husband Thomas Mills for life; and after the death of the survivor, upon trust "for all and every the child and children of Thomas Mills on the body of the said Susanna his wife, to be equally divided between them, if more than one, share and share alike; the part or parts of such of them as should be a son or sons to be paid, assigned or transferred to him or them, at his or their age or ages of twenty-one years; and the part or parts of such of them as should be a daughter or *daughters to be paid, assigned or transferred to her or them, at her or their age or ages of twenty-one years, or day or days of marriage, which should respectively first happen, together with all dividends, interest, income and improvements thereof in the mean time, unless such respective times of payment should happen in the lifetime of the said Thomas Mills and Susanna his wife, or the survivor of them, in which case, the same should be paid, assigned or transferred immediately after the decease of such survivor.

[*318]

"And in case any of the same children should happen to die, before he, she or they should, by virtue of the aforesaid trusts, become entitled to the payment, assignment or transfer of his, her or their respective part or parts of the 6,000*l.* Consols, and of the dividends, interest, increase and improvement thereof, then the part or parts of him, her or them, so dying, should go and be paid, assigned and transferred unto, and to the use of the survivors or survivor of them, who should live to become entitled to have their,

(1) *Wakefield* v. *Maffet* (1885) 10 App. Cas. 422, 55 L. J. Ch. 4, 53 L. T. 169; *Day* v. *Radcliffe* (1876) 3 Ch. D. 654; *Partridge* v. *Baylis* (1881) 17 Ch. D. 835, 44 L. T. 737; *In re Hamlet* (1888) 38 Ch. D. 183, affd. 39 Ch. Div. 426, 58 L. J. Ch. 242, 59 L. T. 745.

In re WILLIAMS.

his or her part or parts thereof, paid, assigned or transferred to them, him or her as aforesaid, together with their, his or her original part or parts thereof."

Thomas Mills died in 1834, and his wife Susanna in 1848. They had had seven children, all of whom had attained twenty-one at the time of the execution of the deed of 1823. They were all now living, except Elizabeth, who died in 1825, having attained twenty-one.

The question was, whether the representatives of Elizabeth were entitled to 857*l.* 2*s.* 10*d.* Consols, being one-seventh of the trust [*319] fund, or whether it had gone *over to her surviving brothers and sister, under the clause of survivorship above referred to.

Mr. Roundell Palmer and *Mr. Collins* for the legal personal representatives of Elizabeth.:

The limitation is to all and every the children; this gives them an immediate vested interest. Payment was to be made at twenty-one or marriage, therefore the title to payment or the capacity to receive accrued at that period, though actual payment could not be made until after the death of the tenants for life. The gift over is not on death before payment, but before becoming "entitled to payment," and such title accrued at twenty-one. The postponement of payment until after the deaths of the parents was necessary for the sake only of preserving the life estates of such parents, and was not intended to alter the rights of the children *inter se.* [They cited *Jeffreys* v. *Reynous* (1), *Schenck* v. *Legh* (2), *Jones* v. *Jones* (3), *Butterworth* v. *Harvey* (4).]

Mr. Turner and *Mr. Druce, contrà,* [cited *Whatford* v. *Moore* (5).]

[321] *Mr. R. Palmer,* in reply.

THE MASTER OF THE ROLLS:

Unless I find something to alter my present impression, I must hold that the fund belongs to the representatives of Elizabeth.

This is a very extraordinary sort of settlement to make under the circumstances. It must have been prepared by some one extremely carelessly, and was most probably copied out of some precedent book without regard to the existing circumstances. A [*322] provision is made for Mr. and Mrs. Mills and the survivor, *and on

(1) 6 Br. P. C. 398.
(2) 7 R. R. 199 (9 Ves. 300).
(3) 60 R. R. 402 (13 Sim. 561).
(4) 73 R. R. 303 (9 Beav. 130).
(5) 3 My. & Cr. 270. See note, next page.

In re WILLIAMS.

their deaths there is a limitation to "all and every their child and children" to be equally divided. So far there is a clear vested interest. Their shares were to be paid at twenty-one, or marriage, unless such times of payment should happen in the lifetime of the parents or of the survivor, in which case the same was to be paid immediately on the death of such survivor. Then there is a clause of survivorship in case any child died before he became "entitled to the payment" of his share.

I will look at the case of *Whatford* v. *Moore* (1), and if I find reason to alter my opinion, I will mention it again. I do not think I ought to be called on to decide this debateable matter on this form of proceeding (2). I should not have done so, except on the request of all parties.

THE MASTER OF THE ROLLS:

Dec. 22.

I have looked at *Whatford* v. *Moore*, and see no reason to alter the opinion I have already expressed.

RODICK *v.* GANDELL.

(12 Beav. 325—339.)

[AFFIRMED on appeal, as reported in 1 D. M. & G. 763.]

1849.
July 25, 26.

Rolls Court.
Lord LANGDALE, M.R.

[325]

SALOMONS *v.* LAING (3).

(12 Beav. 339—354; S. C. 6 Rail. Cas. 289, 303; 19 L. J. Ch. 225; 14 Jur. 279, 471.)

1849.
Nov. 23.
Dec. 4, 5, 6, 7, 8.
1850.
Jan. 12.

Rolls Court.
Lord LANGDALE, M.R.

[339]

A Railway Company became lawfully possessed of shares in another independent Railway Company: Held, that having no authority to do so by their Act of Parliament, they could not legally, as against one dissentient shareholder, increase their number of such shares, or apply their funds for the support of the second Company.

A Railway Company is bound to apply all its monies and property for

(1) 3 My. & Cr. 270, where the gift to children was expressly contingent upon the father leaving a younger child or children living at his death, and was clearly confined to such younger children. That case turned upon the special context of a badly-drawn deed, which could scarcely have any useful application to any other case, and it was there held that a younger child who had married and predeceased the father did not take a share under the contingent gift. The case of *Jeyes* v. *Savage* (1875) 10 Ch. at p. 562, 44 L. J. Ch. 706, 33 L. T. 139, states the principle expressed by Lord COTTENHAM in *Whatford* v. *Moore*, which principle is better illustrated by *Jeyes* v. *Savage* than by *Whatford* v. *Moore*.—O. A. S.

(2) On petition under the Trustee Relief Act.

(3) See *post*, p. 125.

SALOMONS v. LAING.

the purposes directed and provided for by the Act of Parliament, and not for any other purpose whatever. Any application of or dealing with the capital, funds, or money in any manner not distinctly authorised by the Act is illegal; and where directors, for purposes not authorised by the Act. are proceeding to involve the Company or shareholders in liabilities to which they never consented, relief may and ought to be given in this Court. In such a case, one shareholder may sue on behalf, &c.

There were two Railway Companies, A. and B. A shareholder in A. filed his bill on behalf &c. against the Companies A. and B. and the directors of the two Companies, complaining, first, that the directors of A. had illegally invested the funds in shares in B.; and, secondly, of a separate transaction, whereby the capital of A. had been advanced to B. upon an arrangement not authorised, and praying for relief against the several directors: Held, that the bill was multifarious.

THIS case came before the Court upon demurrer to the whole bill.

The following is the substance of the allegations, which, however, will be found more fully stated in the judgment of the COURT:

By the 9 & 10 Vict. c. cclxxxiii., the London and Brighton Railway Company and four other independent tributary Companies were amalgamated, and a new corporation created, called "The London, Brighton, and South Coast Railway," and all the property, "shares," &c., of the five old Companies were vested in the new Company.

[340] Part of the property of one of the amalgamated Companies (the London and Croydon) consisted of 2,033 shares in another independent Railway Company (the Direct London and Portsmouth). The bill alleged, that, in order to assist the Portsmouth Company, the South Coast Company had taken 4,000 additional shares in the Portsmouth Railway Company, and, subsequently, a further number of 677 additional shares, and had made payments in respect thereof.

The bill also alleged, that the Portsmouth Company had resolved to abandon the greatest portion of the line, and to complete only four miles of it, viz., from Epsom to Leatherhead, and that for the purpose, further assistance was wanting, and that the two Companies or their directors had agreed, that the South Coast Company should, out of their funds, supply the Portsmouth Company with pecuniary assistance for the purpose, and should, accordingly, pay them 20,000*l.* by way of, what was called, "compensation for preliminary and Parliamentary expenses," and that an application to Parliament should be made, to authorise the Brighton Company to purchase the four miles of railway from Epsom to Leatherhead for 50,000*l.*, including the 20,000*l.*, which was to be paid in any

event. And that, in the meantime, and until Parliamentary authority could be obtained, the South Coast Company should work the line intended to be purchased, as if it were their own.

The bill was filed by the plaintiff Salomons, on behalf of himself and the other shareholders in the South Coast Railway Company against the South Coast and Portsmouth Railway Companies and certain of their directors, and insisted on the invalidity of these transactions, the same not being authorised by the amalgamating Act, *and it prayed a declaration, that the purchase of the shares [*341] and the agreement, was not within the powers of the Act, and that the parties who had joined in the payments might personally replace the money paid, and for an injunction against completing the agreement.

To this bill, the defendant Laing and ten others, and the South Coast Railway, demurred, for want of equity and multifariousness; and a similar demurrer was filed by William Arthur Wilkinson and the Portsmouth Company.

Mr. R. Palmer and *Mr. W. J. Bovill* for the defendants, the South Coast Company, Laing, and others; and

Mr. Malins for the defendants, the Portsmouth Company and W. A. Wilkinson [cited *Foss* v. *Harbottle* (1), *Mozley* v. *Alston* (2)]:

No impediment is alleged to the Company's filing a bill to obtain the relief required, if the Company be entitled to it. * * *

Mr. Turner and *Mr. Cole*, in support of the bill [cited *Natusch* [342] v. *Irving* (3) and *Colman* v. *The Eastern Counties Railway Company* (4)]:

In this case, the Act of Parliament in no way empowers the South Coast Company to embark their capital in the purchase of new shares in another Railway Company, or to assist it or to buy up a fraction of the Portsmouth Railway. Such an application of the funds is *ultra vires*, and is incapable of being confirmed; for it is a matter in which the majority cannot bind the *minority: *Const* [*343] v. *Harris* (5). * * *

Mr. R. Palmer in reply.

(1) 62 R. R. 185 (2 Hare, 461).
(2) 65 R. R. 520 (1 Ph. 790).
(3) 76 R. R. 54 (2 Coop. t. Cott. 358).
(4) 76 R. R. 78 (10 Beav. 1).
(5) 24 R. R. 108 (T. & R. 496).

SALOMONS v. LAING. 1850. *Jan.* 12.

The MASTER OF THE ROLLS said he would consider the case.

THE MASTER OF THE ROLLS:

This case came on for hearing upon demurrer to a bill filed by the plaintiff on behalf of himself and all other the proprietors of shares in the London, Brighton, and South Coast Railway Company (except the defendants) against the same London, Brighton, and South Coast Railway Company, the Direct London and Portsmouth Railway Company, — Leo Schuster, Edward Crowley, George Frederick Hotham, William Arthur Wilkinson, Samuel Laing, [*344] William Cash, Charles Sedgefield *Crowley, John Lawrie, John Nix, and James Wishaw.

In the argument, the London, Brighton, and South Coast Railway Company was more shortly called the South Coast Company, and the Direct London and Portsmouth Railway Company was more shortly called the Portsmouth Company: I shall adopt these abbreviated names when convenient.

The bill prays a declaration, that it was not within the powers of the South Coast Company or the directors thereof, to subscribe for or purchase, on behalf or out of the funds of that Company, any shares in the Portsmouth Company, and that the defendants, Leo Schuster, Edward Crowley, and George Frederick Hotham ought to be taken and considered as having subscribed for and purchased the 4,000 shares and the 677 shares (which are in the bill mentioned), in the Portsmouth Company, on their own account, and not as trustees for the South Coast Company: and that it may also be declared, that an agreement or arrangement in the bill mentioned, between the directors of the South Coast Company and the directors of the Portsmouth Company, respecting the proposed railway from Epsom to Leatherhead, is not within the powers of the said Companies or of the directors thereof, but that the same is illegal and void, and that the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham, the defendant William Arthur Wilkinson, and also such of the defendants Samuel Laing, William Cash, Charles Sedgefield Crowley, John Lawrie, John Nix, and James Wishaw, as concurred in any of the illegal payments in the bill mentioned out of the funds of the South Coast Company, may be decreed to replace the same with interest thereon: and [*345] that the *defendants Samuel Laing, Leo Schuster, William Cash, Charles Sedgefield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, and James Wishaw, may be

decreed to replace and repay all sums, which have been or may be paid out of the funds of the South Coast Company, in pursuance of the said agreement or arrangement respecting the proposed railway from Epsom to Leatherhead. The bill further prays for a sale of 2,033 shares in the Portsmouth Company, which formerly belonged to the London and Croydon Railway Company, and that an injunction may be granted to restrain the parties from carrying out the agreement as to the proposed railway from Epsom to Leatherhead, and also from applying any of the monies or funds of the South Coast Company in payment of the 20,000*l.*, or in payment of further calls on the 4,000 shares and 677 shares in the Portsmouth Company; and the bill prays for payment of costs by the directors of the Company, who are defendants, and for further relief.

To this bill, two demurrers for multifariousness and for want of equity have been put in: one by the defendants Samuel Laing, Leo Schuster, William Cash, Charles Sedgefield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, James Wishaw, and the South Coast Company; and the other by William Arthur Wilkinson and the Portsmouth Company.

The bill, though in a prolix and complicated form, states, to the effect, that, in the year 1846, there were five several Railway Companies known by the respective names of the London and Croydon Company, the Croydon and Epsom Company, the London and Brighton Company, the Brighton, Lewes and Hastings Company, *and the Brighton and Chichester Company, and also another [*346] Railway Company, called the Direct London and Portsmouth Company: that 2,033 shares of the Direct London and Portsmouth Railway Company had become vested in William Arthur Wilkinson, Benjamin Baines, and John Lawrie, in trust for the London and Croydon Company: that by an Act passed in the 9 & 10 Vict. c. ccxxxiii., intituled "An Act to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them," it was enacted, that the several Companies therein mentioned should be dissolved, and that the powers given to them should be vested in the Company thereby incorporated; and that the several persons and corporations who, before the passing of the Act, were proprietors of shares in the capitals or joint stock of the dissolved Companies, should be united into a Company, for the purpose of working, completing, and maintaining the railways and works authorized to be made by or for the dissolved Companies, under the authorities vested in them; and,

SALOMONS v. LAING.

for those purposes, should be incorporated by the name of "The London, Brighton and South Coast Railway;" and the railways and appurtenances belonging to the dissolved Companies, and also all monies, stock, shares, securities and books, to which the dissolved Companies were entitled, were to become vested in the Company thereby incorporated, and the said Act contained various enactments respecting the capital and stock of the Company thereby incorporated and the shares therein.

The plaintiff in this cause was, under the provisions of the Act, entitled to forty-eight shares in the new or South Coast Company: and he afterwards purchased 100 other shares therein. It is not disputed by this bill, but that, under the provisions of the Act, the [*347] 2033 *shares in the Direct London and Portsmouth Railway Company, which were vested in W. A. Wilkinson, B. Baines, and John Lawrie, in trust for the London and Croydon Company, became the property of the South Coast Company. But the bill for incorporating the South Coast Company contains no power authorising the Company, directly or indirectly, to subscribe for or purchase any shares in the Direct London and Portsmouth Company, or to apply their funds or capital for any such purpose. And none of the dissolved Companies had any such power.

The bill alleges, that Samuel Laing (the chairman), Leo Schuster (the deputy chairman), and William Cash, Charles Sedgefield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, and James Wishaw were directors of the South Coast Company; and that the same Samuel Laing, Charles Sedgefield Crowley, Edward Crowley, George Frederick Hotham, John Nix, and Leo Schuster were also directors of the Direct London and Portsmouth Company. The bill then states, that before the Portsmouth Company could put in force their compulsory powers for taking land for the purposes of their railway, it was necessary, that a sum of 1,450,000*l.*, the estimated expense, should be subscribed for, but that no more than 1,250,000*l.*, including the value of the 2,033 shares which had belonged to the London and Croydon Company, had been subscribed for, and consequently, that further subscriptions, to the amount of 200,000*l.*, at least, were required to be obtained; but it was found impracticable to obtain them in the ordinary way; and that, under such circumstances, the directors of the two Companies concurred in a scheme, for supplying, and agreed to supply, the deficient subscriptions wanting by the Ports- [*348] mouth Company, out of the funds of the South *Coast Company, by

means of some of the directors subscribing for shares in the Portsmouth Company in their own names, but as alleged trustees for the South Coast Company. And, on the 16th of October, 1846, the directors of the Portsmouth Company passed a resolution as follows: "Whereas, previously to notice being given for the purchase of land, it is necessary, that the signature to the Parliamentary contract should be completed, to the extent of the estimated expense for making the railway, viz. 1,450,000*l.*, it is resolved, that, with a view to complete the subscription for the whole amount mentioned in the Act as the estimated sum for defraying the expenses of the undertakings, and which is requisite before any of the powers for the compulsory purchase of land can be enforced, the South Coast Railway be requested to claim subscriptions to the contract to the extent of 200,000*l.*, as the agreement between the two parties contemplates, that any capital required beyond the sum of 1,250,000*l.* should be provided for by the South Coast Company."

And on the 4th of November, 1846, the directors of the South Coast Company resolved, "that the shares necessary to complete the capital of the Portsmouth Company be issued to Mr. Schuster, Captain Hotham and Mr. Crowley, that the deposit be paid thereon, and the members of the Board be requested to sign the Portsmouth deed for the needful amount, and that 2,033 shares, standing in the name of Messrs. Wilkinson, Baines and Lawrie, be transferred to the said trustees, after the deed shall be fully signed in respect of such shares." And that, on the 10th of November, 1846, it was resolved by the directors of the Portsmouth Company, that 4,000 shares, to represent the capital referred to in the resolution of the said 16th of October, should be issued to Leo Schuster, Edward Crowley *and George F. Hotham, as trustees for the South Coast [*349] Company, agreeably to the resolution of the board of directors of that Company of the 4th of November.

In pursuance of the arrangements expressed in these resolutions, the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham subscribed, in their names, for, and procured to be allotted to them, 4,000 shares in the Portsmouth Company. They executed the deed relating to the shares, and they and the other directors of the South Coast Company paid, out of the monies and funds of that Company, the sum of 15,000*l.* for such 4,000 shares in the Portsmouth Company, being after the rate of 3*l.* 15*s.* for each share; and besides, the 2,033 shares formerly standing in

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the names of William Arthur Wilkinson, Benjamin Baines, and John Lawrie were transferred into the names of Leo Schuster, Edward Crowley, and George Frederick Hotham, in addition to the 4,000 shares; and afterwards, with the view to give further assistance to the Portsmouth Company out of the funds of the South Coast Company, the defendants, directors of the South Coast Company, agreed that such further assistance should be advanced out of the funds of the South Coast Company; and that the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham, or some other of the defendants, should subscribe for or purchase certain additional shares in the Portsmouth Company, and that the deposit or purchase-money for such shares should be paid out of the funds of the South Coast Company: and that accordingly, 677 additional shares in the Portsmouth Company were, in pursuance of such agreement of the South Coast Company, purchased by the said Leo Schuster, Edward Crowley, and George
[*350] Frederick Hotham, or some others of the defendants, and *the sum of 2,538*l.* 15*s.* was paid, as purchase or deposit money, out of the funds of the South Coast Company. The bill alleges, that these transactions were, and were known to be, illegal, and that an attempt was made to procure a Parliamentary sanction for the same, but that the bill which was brought in for the purpose was thrown out.

The bill then proceeds to state, that the Portsmouth Company, being unable to complete their whole line, had resolved to abandon the greatest portion of it, and to complete only four miles of it, viz. the part leading from Epsom to Leatherhead; and that, for the purpose of enabling them to complete even that part of it, further assistance was wanting, and it was agreed between the two Companies or their directors, that the South Coast Company should, out of their funds, supply the Portsmouth Company with pecuniary assistance for the purpose, and should, accordingly, pay them 20,000*l.* by way of what is called "compensation for preliminary and Parliamentary expenses;" and that an application to Parliament should be made, to authorise the South Coast Company to purchase the four miles of railway from Epsom to Leatherhead for 50,000*l.*, including the 20,000*l.*, which was to be paid in any event; and that, in the meantime and until Parliamentary authority could be obtained, the South Coast Company should work the line intended to be purchased as if it were their own.

The bill then states, at great and I think unnecessary length, the

proceedings in the case of *Cohen* v. *Wilkinson* (1), a report made to a meeting of the Portsmouth Company, together with an address or speech of Mr. Wilkinson, a meeting of the South Coast Company, *and an explanation or speech of Mr. Laing; all, I presume, inserted, for the purpose of showing the negotiation between the Companies, for the purpose of completing or obtaining authority for completing the purchase, by the South Coast Company, of the portion of the line not abandoned by the Portsmouth Company, for 50,000*l.*, including the 20,000*l.*, which in one place is called a premium. It is then stated, that the defendants, the present directors of the South Coast Railway Company, have already paid, out of the funds of such Company, some portion of the 20,000*l.*, and intend to pay further sums to the Portsmouth Company on account thereof.

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[*351]

It was argued for the demurrer, that the relief prayed for by this bill is divisible into two distinct heads: first, in respect of the shares of the Portsmouth Company purchased out of the funds of the South Coast Company; second, in respect of the agreement alleged to have been made for the purchase by the South Coast Company from the Portsmouth Company of the line from Epsom to Leatherhead.

It was alleged, that in respect of the 2,033 shares in the Portsmouth Company, which became vested in the South Coast Company by the Amalgamation Act, the South Coast Company became entitled to an interest in the affairs and concerns of the Portsmouth Company; and, for the purpose of protecting that interest, were entitled to enlarge it, if they thought fit, and thereby, or otherwise, to apply their own funds in promoting the interest of the Portsmouth Company; and it was further suggested, that the bill, not alleging that the purchased shares were paid for out of capital, but only out of the funds of the South Coast Company, those funds may have been such as the directors had authority *to apply in the manner they did; and it was alleged, that, in fact, there are various modes, in which it might have been done, and in which, in the argument of a demurrer, it ought to be presumed to have been done, without going beyond the powers of the Act. These arguments were urged with great zeal, but I am of opinion that they cannot be maintained.

[*352]

A Railway Company, incorporated by Act of Parliament, is bound to apply all the monies and property of the Company for the

(1) *Ante*, pp. 47, 54.

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purposes directed and provided for by the Act (1), and for no other purpose whatever. When the expenses are paid, and the public purposes which are directed and provided for by the Act (and which were the motive or inducement for granting the powers given by the Act), are fully performed, any surplus which may remain, after setting apart a sum to answer contingencies, may (if not applied in enlarging, improving, or repairing the works) be divided among the shareholders. The dividend, which belongs to the shareholders and is divisible among them, may be applied by them, severally, as their own property.

But the Company itself, or the directors, or any number of shareholders assembled at a meeting or otherwise, have no right to dispose of the share of the general dividend which belongs to any particular shareholder, in any manner contrary to the will or without the consent or authority of that particular shareholder. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the Company, which comes under the control or management of the directors or governing body of the Company, in any manner not distinctly authorised by the Act, is, in my opinion, an illegal application or *dealing; and, without meaning to say, that it is or could be practicable for individual shareholders to interfere on every occasion of alleged misapplication of particular sums, I am of opinion, that if, as in this case, the directors are proceeding upon an illegal principle, and for purposes not authorised by the Act, to involve the Company or the shareholders of the Company, or any of them, in liabilities, to which the shareholders or any shareholder never consented, relief may and ought to be given in this Court; and that the mere circumstance of the South Coast Company having obtained, as it is not now disputed they did lawfully obtain, a certain number of shares in the Portsmouth Company, is not a reason why the Company should be enabled or permitted to purchase more shares, and thereby increase the risks to which Parliament permitted the shareholders to be exposed, by the shares which may have become vested in them by the Amalgamation Act, or why the directors should be permitted to divert as much of the funds of the Company as they think proper, or indeed any part of those funds, for the support of another Company, having distinct objects, and meant to be applied to purposes different from those, in consideration of which alone their powers were granted to them.

[*353]

(1) 8 Vict. c. 16, s. 122.

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I am, therefore, of opinion, that the demurrers, for want of equity, must be overruled.

But the demurrers for multifariousness remain, and, having regard to the mode in which the allegations are stated in this bill, I think that the grounds of complaint are stated as distinct matters. It was argued for the plaintiff, that the agreement for the purchase of the line from Epsom to Leatherhead was but a sequence of the former transaction as to the purchase of shares; but I have sought in vain for any *allegation in the bill, which, in the least degree, [*354] connects the transactions. I may conjecture, and I think it rather difficult not to conjecture, that all the transactions are connected and form part of one design or scheme; but such scheme is not distinctly stated, and I can only proceed upon that which is distinctly stated, which, in the great prolixity of this bill, I collect to be, that there was an illegal transaction of purchasing shares in the Portsmouth Company, and another illegal transaction or agreement for the purchase of a railway the property of the same Company. The two transactions are, as I think, both of them illegal, for the same reasons, that they alike involve illegal applications of the funds of the South Coast Company. But they are not alike, either as to the persons affected by them, or as to the relief which may ultimately be given in respect of them; and unless they are connected in a way which does not appear by this bill, I think relief cannot be given upon them both in one bill.

Overrule the demurrers for want of equity.

Allow the demurrers for multifariousness, with leave to amend the bill.

BUCHANAN *v.* GREENWAY (1).

(12 Beav. 355—356.)

1849. *Dec.* 22.

Rolls Court. Lord LANGDALE, M.R.

[355]

Where a mortgagee receives rents between the report and day of payment, it is not the practice, on directing the accounts to be continued and the time to be extended, to order the mortgagor forthwith to pay the arrears of interest and costs.

A DECREE had been made for a foreclosure; the Master had ascertained the amount due, and had fixed a time for payment. Between the date of the report and the day appointed for payment, the mortgagee had received two small sums of 3*l.* 7*s.* 11½*d.* and 3*l.* 7*s.* 11½*d.* for rent.

(1) *Coleman* v. *Llewellin* (1886) 34 Ch. D. 143.

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Mr. Roupell and *Mr. Selwyn*, for the mortgagor, asked for a reference back to take an account of the subsequent rents, and to fix a new day for payment.

[They cited *Garlick* v. *Jackson* (1), *Alden* v. *Foster* (2).]

Mr. Turner and *Mr. J. H. Taylor*, for the mortgagee:

Rather than incur a further delay, the mortgagee is willing to verify by affidavit the amount received, and to pay it over to the defendant.

At all events, no order should be made postponing the payment, except on the condition of the immediate payment of the arrears of interest and costs (3).

Mr. Roupell, in reply:

The mortgagor is entitled to have the account continued. The delay has been occasioned by the mortgagee himself, who, by his
[*356] own *act, has altered the state of the account. This is not like the case of a mortgagor asking, by way of indulgence, an enlargement of the time, and who, as a condition, is required to pay up the arrears of interest and costs.

THE MASTER OF THE ROLLS:

Rents have been received by the mortgagee, which have not been brought into the account. I think that this prevents the foreclosure, and makes it necessary to carry on the accounts, and to appoint another day for payment.

The only question is upon what terms the time is to be enlarged; and, as I am not satisfied that when the account has been altered by the mortgagee himself, it is the practice to order the immediate payment of the arrears of interest and costs, I must simply direct the Master to continue the accounts and appoint a new day, not exceeding three months, for payment, and to add the costs of the application (4).

(1) 55 R. R. 33 (4 Beav. 154).
(2) 59 R. R. 572 (5 Beav. 592); and see *Geldard* v. *Hornby*, 58 R. R. 60 (1 Hare, 251).
(3) See *Eyre* v. *Hanson*, 50 R. R. 253 (2 Beav. 478).
(4) Reg. Lib. 1849 A. fol. 434.

RUDGE *v.* WINNALL (1).

(12 Beav. 357—361; S. C. 18 L. J. Ch. 469; 13 Jur. 737.)

1849.
July 20, 21,
22.
Dec. 22.

Rolls Court.

Lord LANGDALE, M.R.

[357]

A devise of real estate in the occupation of the testator, in trust for A., with a bequest of all live and dead stock, and all personal estate to B.: Held, that the emblements on the real estate passed to B.

A testator, standing *in loco parentis*, gave to trustees a legacy of 4,000*l.*, on trust to pay it to A. B., on his attaining twenty-one. He authorised them to raise it by mortgage of his real estates; and out of the monies thereby bequeathed, to raise such sum, not exceeding the interest at 4 per cent. of the expectant portion, as to them should seem sufficient for maintenance: Held, that the legatee, during minority, was entitled to maintenance only, and not to the whole amount of interest on the legacy.

THE testator devised a real estate called Prior's Court, which was in his occupation at his death, to two trustees, who were also his executors, in trust for John Barrett for life, with remainders over; and he devised other real estates in trust for other parties.

He also bequeathed to the same trustees and executors "all his live and dead stock, household furniture and effects, and all his personal estate whatsoever and wheresoever," upon trust to sell &c.

He bequeathed 12,000*l.* sterling, and the residue of his personal estate, to the executors, upon trust to invest the same, and pay 4,000*l.*, part thereof, to his grandson, James Barrett, "on his attaining the age of twenty-one years;" and the sum of 2,000*l.*, other part thereof, to his granddaughter, Louisa Barrett, on her attaining twenty-one years, or marrying under that age. And in case only one of them should live to attain the age of twenty-one years or marry, as aforesaid, then the said sum of 6,000*l.* was to be in trust for such one grandchild.

He declared the trusts of the other 6,000*l.* and of the residue of his personal estate in favour of other parties.

The testator authorised and empowered his trustees, within twelve months after his decease, to raise the 12,000*l.* by mortgage of his real estates. [358]

He declared that it should be lawful for the trustees, out of the trust monies thereby bequeathed, to levy and raise, for the maintenance and education of his grandchildren, "for whom he intended to provide a portion or portions as aforesaid;" in the mean time, and until his and their portion or respective portions should become payable, such yearly sum and sums of money, not exceeding what the interest of the expectant portion or portions, intended to be thereby provided for such child or children respectively, would

(1) *In re Roose* (1880) 17 Ch. D. 696, 15 L. J. Ch. 197, 43 L. T. 719.

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amount to, after the rate of 4*l.* per cent. per annum, as to the said trustees should seem sufficient," and to be raised and paid in such manner and at such times as to the trustees should seem meet.

The testator also authorised them to raise any sum for their advancement or preferment.

After the testator's death, the emblements on the Prior's Court estate at the testator's death, consisting of crops of wheat, turnips, and vetches unsevered, were sold, and produced 210*l.* 5*s.*

It also appeared, that the testator, in his life, stood *in loco parentis* towards the two grandchildren, their father being dead.

Two questions arose, first, whether the emblements belonged to the devisee of the estate, or to the legatee of the personalty?

[359] Secondly, whether the grandchildren were entitled to the full amount of 4 per cent. on their portion, or only to that portion of it, which had been applied by the trustees towards their maintenance and education?

Mr. Roupell and *Mr. Elmsley*, for parties interested in the personal estate, contended, that the emblements formed part of the personal estate. [They cited *Cox* v. *Godsalve* (1), *West* v. *Moore* (2), and *Vaisey* v. *Reynolds* (3).]

Secondly, that the testator only intended the grandchildren to have sufficient for their maintenance, until their legacies became payable; and the gift, which consisted only in the direction to pay on attaining twenty-one, did not vest until that time.

Mr. Walpole and *Mr. E. L. Pemberton* for the two grandchildren, [cited *Chambers* v. *Goldwin* (4), *Boddy* v. *Dawes* (5)]:

[360] It will be said, that, in this case, the testator has made another provision for the maintenance, and that therefore the rule does not apply as in *Donovan* v. *Needham* (6); but here the provision is made not out of other funds, but out of the interest. The distinction is pointed at by the COURT in *Wynch* v. *Wynch* (7), where the COURT said, "If it had been payable out of the interest of the legacies, I should have thought the daughters entitled to what they claim." * * *

Mr. Bowyer argued, that the testator, having made a provision for the maintenance of the grand-children, excluded the implied

(1) 8 R. R. 570 (6 East, 604, *n.*).
(2) 9 R. R. 460 (8 East, 339).
(3) 29 R. R. 4 (5 Russ. 12).
(4) 8 R. R. 61 (11 Ves. 1).
(5) 44 R. R. 91 (1 Keen, 362).
(6) 73 R. R. 309 (9 Beav. 164).
(7) 1 Cox, 433; fully stated in 73 R. R. 311.

gift of interest. That there was no absolute direction to raise the 12,000*l.*, but a discretionary power only, and that the amount of maintenance was also to be limited by the discretion of the trustees.

RUDGE v. WINNALL.

Mr. Turner and *Mr. Hetherington*, for the devisee of the real estate, argued, that the words "live and dead stock" were insufficient to deprive the devisee of the crops growing on the estate at the testator's death; and, secondly, that the grand-children were only entitled to a sufficient sum for their maintenance, and not to the amount of interest not so employed.

The MASTER OF THE ROLLS declared, that the emblements or crops growing, at the time of the testator's death, on such part of his real estates as were then in his own occupation, formed part of the personal estate of the testator. [361]

And that James Barrett, in respect of his presumptive interest in the sum of 4,000*l.*, was entitled to maintenance and education only, until he obtained a vested interest.

ROBERTSON *v.* SKELTON (1).

(12 Beav. 363—365; S. C. 19 L. J. Ch. 140.)

1849. *Dec.* 10.
1850. *Jan.* 31.

Rolls Court.

Lord LANGDALE, M.R.

By conditions of sale, interest was payable from November, 1846, if, "from any cause whatever," the purchase should not be then completed. The vendors did not make out their title until March, 1849: Held, that interest was payable only from the last-mentioned period.

THIS case, reported *ante*, p. 89, on another point, now came on upon the question: from what time interest was payable on the purchase money? [363]

The sale took place by auction on the 24th of July, 1846, and Higinbotham became the purchaser.

By the conditions of sale, the purchaser was to get the report confirmed before the 8th of August, and in default, the vendor was to be at liberty to do so at the purchaser's expense. The purchaser was to pay his purchase money into Court before the 12th of November, 1846, and to be let into possession as from the 29th of September, 1846; "but in the event of the purchase not being completed, from any cause whatever, and the purchase money not paid before the 12th of November, 1846, the purchaser was to pay

(1) See the cases on this point in a note on *De Visme* v. *De Visme*, 84 R. R. at p. 83.—O. A. S.

ROBERTSON v. SKELTON.

interest on his purchase money," at 5 per cent. from the 12th of November, until payment.

In consequence of the purchaser's default, the plaintiff, on the 20th of April, 1847, obtained an order to confirm absolutely the Master's report of the best purchaser.

[364] In June, 1847, on an application by the plaintiff to have the purchase money paid into Court, a reference was made to the Master to inquire whether a good title could be made.

The Master reported that a good title could be made, and his report was confirmed on the 8th of March, 1849.

The question was, whether the purchaser was liable to pay interest from the 12th of November, 1846, or from what other time.

Mr. Martindale, for the plaintiff, asked that the purchaser should be ordered to pay interest on his purchase-money from the 12th of November, 1846. * * *

Mr. Steere, contrà :

The delay has been occasioned by the vendors not delivering a proper abstract, and by their not making out their title to the property. They cannot take advantage of their own wrong, for the [*365] purpose of charging the purchaser with interest. Such *general terms as "from any cause whatever" do not extend to a case, where the cause has arisen from the vendor's own default.

Whatever might have been the rule formerly (1), it has now been settled by Lord COTTENHAM, in a precisely similar case of *De Visme* v. *De Visme* (2), that a vendor, under such a condition of sale, is entitled to interest from the time a good title is shown only.

Mr. Martindale, in reply.

The MASTER OF THE ROLLS said he would look at the authority last cited before deciding.

1850. *Jan.* 31.

THE MASTER OF THE ROLLS :

The vendor asks for interest from the 12th of November, 1846, at which time it was contemplated that the purchase would be completed. On the other hand, the purchaser resists this, because the vendor did not show a good title until March, 1849, and he produces the case of *De Visme* v. *De Visme*, in which the LORD CHANCELLOR seems to have held, that if the delay in completing arises from the vendor's not making out his title, the

(1) *Esdaile* v. *Stephenson*, 24 R. R. 151 (1 Sim. & St. 122). (2) 84 R. R. 83 (1 Mac. & G. 336).

purchaser is, under such a condition of sale, only liable to interest from the time a good title was shown. ROBERTSON v. SKELTON.

Such being the present rule of the Court, I am of opinion, that the vendor is not entitled to interest from the 12th of November, 1846, but only from the confirmation of the report.

SCOTT *v.* WHEELER.

1850. *Feb.* 7, 25.

(12 Beav. 366; S. C. 19 L. J. Ch. 402.)

Rolls Court. Lord LANGDALE, M.R. [366]

An order for production cannot be made against an executor upon admissions in his testator's answer.

A DEFENDANT had admitted the possession of certain documents, and had been ordered to produce them. Before production he died, and a simple bill of revivor being filed against his executor, the suit was revived.

Mr. James Anderson now moved for production against the executor.

THE MASTER OF THE ROLLS:

You must obtain the executor's admission of the possession before I can make such an order.

IN RE THE NORWICH YARN COMPANY.

1850. *Jan.* 14.

(12 Beav. 366—369.)

Rolls Court. Lord LANGDALE, M.R. [366]

By a deed of settlement of a joint stock Company, executors were not to be proprietors: Held, nevertheless, that they were contributories, and might maintain a petition to wind up.

Where a Company is insolvent, and has been getting worse, it is no answer to an application to wind it up to say, that the difficulties are temporary, and that there is hope of more prosperous times.

IN 1834, the Norwich Yarn Joint Stock Company was established, with a capital of 30,000*l.* divided into 300 shares, nearly the whole of which had been paid up.

The Company was regulated by a deed of settlement, one of the articles of which provided, that *executors of deceased proprietors [*367] should not be proprietors of the testator's shares, or entitled to receive any dividends, but the same should remain in suspense until some persons should become proprietors of such shares. Provision was however made for the executors to become proprietors in the manner therein pointed out, or to sell and transfer the shares with the consent of the directors.

In re THE NORWICH YARN COMPANY.

The business was carried on at a loss, and in June, 1846, the deficiencies of the assets of the Company amounted to 10,000*l.* In 1848, "a heavy loss" was reported, and the dissolution of the Company recommended. In letters written by a Mr. Stewart in 1849, it was represented that the loss approximated to 30,000*l.*, although the working profits of the year amounted to 1,700*l.*; but this was without charging interest on the heavy debts.

Mr. Harvey was a proprietor of ten shares. He died in 1842, and the two petitioners were his executors. They sold the shares in 1842, but the directors refused to ratify and confirm the transfer, on the ground of the circumstances of the proposed transferees.

The executors now presented a petition under the Winding-up Acts (1), for the dissolution of the Company, and the winding up of the concern.

Mr. Roupell and *Mr. E. Younge*, in support of the petition.

Mr. R. Palmer, for Mr. Cousins, a shareholder, opposed the petition, contending, first, that the petitioners as executors, were [*368] not, by the provisions of the *deed, proprietors, or entitled to any share in the profits; and that it did not appear that the concern was insolvent at the testator's death, which was necessary to make his executors liable; secondly, that there was no sufficient evidence that the state of the Company was such, as to bring the case within the Act, for the information relied on was a mere statement in the correspondence of Stewart, who was not an officer of the Company, and no actions had either been brought or been threatened against the Company or proprietors; and, lastly, that though the concern had been a losing one during a temporary depression in trade, still that it was improving, and might yet turn out profitable.

Mr. Turner for the directors.

Mr. Roupell, in reply, cited *Thomas's* case (2), to show that the executors were to be deemed contributories within the Act.

THE MASTER OF THE ROLLS:

This petition prays that the Company may be dissolved, and wound up under the recent statute.

Several objections have been made to this: first, it is said, that it has not been proved that the petitioners are under any liability to pay: but I think that they are clearly interested, and may be

(1) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

(2) 75 R. R. 206 (1 De G. & Sm. 579).

called on to contribute or pay. This, therefore, is no sufficient objection to this petition. Secondly, it is said, that the petitioners are not entitled to the profits. It is not material, whether they are or not, if, by the Act, they are to be deemed contributories.

[369]

The next objection is, that the evidence consists in part of letters written by Stewart, who is not an officer of the Company. It is true that he has given information, which cannot be considered official information from the Norwich Yarn Company; but he has stated facts, which the directors have stated at the public meeting of the Company, and I think this objection cannot prevail.

Next it is said, there has been no account duly audited, showing the state of the affairs of the Company. It is alleged in the affidavit that there is such a provision in the deed; but it is not stated that it has not been acted on.

The question now to be considered is this: whether the circumstances of the Company are such as to make a dissolution proper. Though I think that the petition does not state the facts as distinctly as it might, still I am of opinion that it states enough to show that the order ought to be made.

The concern is insolvent, and has been daily getting worse and worse. Is it any answer to say that the Company is in circumstances of temporary difficulty, and that there is every hope for more prosperous times? Some of the parties may fairly imagine so; but that is no reason why an insolvent concern getting daily worse and worse should be allowed to go on, possibly to the ruin of all parties concerned in it.

I think on the whole that the order should be made as prayed.

SALOMONS *v.* LAING (1).

1850.
March 4, 5, 8.

(12 Beav. 377—384; S. C. 19 L. J. Ch. 291.)

Rolls Court.
Lord LANGDALE, M.R.
[377]

The directors of one incorporated Railway Company paid over its funds to another Railway Company, for purposes wholly unauthorised; and the latter received them with knowledge of the breach of trust: Held, on demurrer, that the second Company were properly made parties to a suit to bring back the fund; and, secondly, that, in such a case, an individual shareholder in the first Company might sue the second Company "on behalf" &c., without alleging that the corporation of which he was a member had refused to sue.

THE bill in this cause having been found defective for multifariousness (2), the plaintiff amended it, by striking out the second

(1) *Russell* v. *Wakefield Waterworks Co.* (1875) L. R. 20 Eq. 474, 44 L. J. Ch. 496, 32 L. T. 685.

(2) See *ante*, p. 107.

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transaction complained of. The substance of the statements in the present bill was as follows:

The South Coast Company (1), became, under their Amalgamating Act (2), rightfully possessed of 2,033 shares in the Portsmouth Railway Company (1) (an independent undertaking), but no power was given to them of increasing their stake in that Company.

The bill alleged, that some of the defendants were directors of both Companies, and that there being a deficiency in the subscription of the Portsmouth Company, necessary to enable them to put in force their compulsory powers, the directors of the two Companies, in order to complete the subscribed capital, entered into an arrangement, whereby the South Coast Company took 4,677 additional shares in the Portsmouth Company, in the names of three trustees, and paid, out of the funds of the South Coast Company, the sum of 24,544*l.*, for deposits and calls thereon.

The bill insisted, that this transaction was illegal, and that its illegality was known to the directors of both Companies. It charged,
[*378] that the aforesaid sum *of 24,544*l.* 5*s.* was illegally paid in respect of the said 4,677 shares out of the capital and funds of the South Coast Railway Company to the Portsmouth Railway Company; and that the last-named Company received such monies, with full notice and knowledge that the same were being so paid to them illegally and by a breach of trust; and that the Portsmouth Railway Company concurred and assisted in such breach of trust. It submitted, that the Portsmouth Company were liable to repay and replace the money, and it charged also, that they were about to make further calls on the shares in question.

The bill was filed by Salomons on behalf of himself and all other shareholders in the South Coast Company against the two Companies and the directors. The bill prayed a declaration, that the transaction was not within the powers of the South Coast Company: that the trustees should be considered as having subscribed for the additional shares on their own account: that an account might be taken of the sums so illegally paid, and that the directors and the Portsmouth Company might repay and replace the amount with interest.

To this bill the Portsmouth Company demurred generally; but the cause assigned was, that the plaintiff, as an individual member of the Company, was not entitled to sue in respect of wrongs and injuries done to the corporation.

(1) The short title of the several Companies is used throughout the report.

(2) 9 & 10 Vict. c. cclxxxiii.

Mr. Malins and *Mr. W. J. Bovill*, in support of the demurrer: SALOMONS v. LAING.

The plaintiff, an individual member of a corporate Company, is incapable of suing third parties, in respect of injuries done to the corporation. The Company alone have the right and duty to sue in respect of such matters. If a person wrongfully *took away a [*379] carriage or locomotive engine belonging to a Company, none but the Company could maintain an action of trover to recover it back; so, in respect of any equitable claim, the Company alone can sue, to have the fund restored wrongfully applied by the directors.

The inconvenience of a contrary rule is obvious, for then every member might take on himself to institute a suit of his own for the same matter, and the number of suits for the same object could only be limited by the number of the members in the Company. In an ordinary partnership, one partner cannot sue third parties in respect of partnership rights; so the general rule is, that a legatee cannot sue a debtor to the estate, except in a very special case: *Lancaster* v. *Ecors* (1). Here the principle is the same, and there is no statement of any loss having as yet occurred, or any allegation of the insolvency of the directors.

2. The plaintiff must, at all events, show, that the Company have refused to sue, or that there is some obstacle which prevents the corporation obtaining relief in the ordinary mode: *Foss* v. *Harbottle* (2), *Preston* v. *The Grand Collier Dock Company* (3), *Mozley* v. *Alston* (4), *Lord* v. *The Copper Miners' Company* (5). No reason is stated, why relief could not be had against the directors alone, without making an independent Company parties to the litigation.

Mr. Turner and *Mr. Cole*, for the plaintiff:

The equity relied on by the bill is simply this, that a sum of 24,544*l.* 5*s.*, being trust monies placed in the hands *of the directors [*380] of the South Coast Company for a particular purpose, has illegally and in breach of trust been handed over to another Company, to be employed by them, for a purpose totally different and unwarranted by the Act, and that the latter Company received the amount with full knowledge of the breach of trust thereby committed. That being the fact admitted upon this demurrer, the principle applicable to such a case is clearly settled, viz.: that every person receiving trust money in breach of trust, and with notice, is responsible for

(1) 55 R. R. 33 (4 Beav. 158).
(2) 62 R. R. 185, 206 (2 Hare, 461, 490).
(3) 54 R. R. 380 (11 Sim. 327).
(4) 65 R. R. 520 (1 Ph. 790).
(5) 78 R. R. 270 (2 Ph. 740).

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it equally with the trustees: *Wilson* v. *Moore* (1). All are principals, for there is no such thing as a secondary liability in cases of breach of trust. It would be useless to have two suits for the same purpose, involving a double expense, and the trouble of proving the same case twice over.

As to the right of a shareholder to sue in such a case, that has been established in at least five cases. The principle laid down in *Foss* v. *Harbottle*, *Mozley* v. *Alston*, and *Lord* v. *The Copper Miners' Company* is this: There are many minor matters, as matters of internal management, in which a majority of partners can bind the minority: *Const* v. *Harris* (2); and on which, in a Company, a general meeting may decide. In relation to such matters, an individual member cannot sue on behalf of the Company; for otherwise the right of the majority would be destroyed; but in cases where directors are acting *ultra vires*, where no majority can bind, and where the transaction cannot be confirmed at a general meeting as against one single dissentient, there, an individual member may
[*381] sue on *behalf, &c. Such were the cases of *Natusch* v. *Irving* (3), *Colman* v. *The Eastern Counties Railway Company* (4), *Cohen* v. *Wilkinson* (5), *Richardson* v. *Hastings* (6), *Bagshaw* v. *The Eastern Union Railway Company* (7). Here the transaction is contrary to the Act, and cannot be confirmed even as against the plaintiff, and he is therefore entitled to sue, and in this particular form.

Mr. Bovill, in reply. * * *

THE MASTER OF THE ROLLS:

Independently of the question as to the right to sue by one, this case seems to me to be clear and plain. The complaint amounts in substance to this: that the South Coast Company had in their hands certain monies which were applicable to one purpose only,
[*382] *and to the performance of one particular trust, under an authority given to them by Act of Parliament, which passed in consequence of their engagement to apply these monies for the particular purposes stated therein; and it gave the Company very extensive powers over the private property of many individuals; and having

(1) 36 R. R. 272 (1 My. & K. 126, 337, 358); and see *Fyler* v. *Fyler*, 52 R. R. 217 (3 Beav. 550); *A.-G.* v. *The Corporation of Leicester*, 64 R. R. 49 (7 Beav. 176).
(2) 24 R. R. 108 (T. & R. 496).
(3) 76 R. R. 54 (2 Coop. t. Cott. 358).
(4) 76 R. R. 78 (10 Beav. 1).
(5) *Ante*, pp. 47, 54.
(6) 83 R. R. 112 (11 Beav. 17).
(7) 86 R. R. (7 Hare, 114; affirmed, 2 Mac. & G. 389).

these monies for that particular purpose only and for no other, the South Coast Company, instead of so applying them, have paid them over to the Portsmouth Company for another and quite different purpose. That is the case of the South Coast Company.

On the other hand, the Portsmouth Company had full notice of the only legal purpose for which those monies could be applied, and having that notice, they nevertheless received the money avowedly for the purpose of applying it to an illegal purpose, and for which it was expressly paid to them; that is the situation of the Portsmouth Company. Now, whether it is alleged in words or not, it appears, that both the parties to this transaction are guilty of fraud and collusion. They are guilty of fraud against the Legislature, who gave them their powers for purposes entirely different, and they are guilty of collusion in uniting and combining together for the purpose of completing that fraud. But it is not necessary to declare that they have been guilty of fraud and collusion: it is enough to say that they were parties to the same breach of trust, the one in paying, and the other in receiving these monies for a known illegal purpose, to which neither of them had any right to apply it; and that this money, which is now in the hands of the Portsmouth Company, ought to be restored.

The question therefore is, whether the Portsmouth Company ought to be made parties to this suit, seeking *a declaration of the rights [*383] of the parties, and the recovery from the Portsmouth Company of this money, which they have received with knowledge that it was trust money, which ought to have been applied to a purpose entirely different.

I have not the least doubt they are properly made parties to this suit. They are not third parties; they have made themselves principal parties to this misapplication; they have themselves obtained the money, knowing the purpose to which alone it ought to be applied, knowing the persons to whom it belonged, and yet getting it out of the hands of persons having the management of it for one purpose, in order to apply it to other and quite different objects. I think there is no doubt that they are proper parties to this suit.

The question next is, whether this plaintiff, by himself, is entitled to sue under the circumstances. That he is entitled to sue the South Coast Company on behalf of the other persons interested has not been denied, and very properly so, because it would only have led to an idle consumption of time. Having a right to do

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that, has he not also a right, at the same time, to sue the persons who have participated in and received the benefit of that illegal act, and who are claiming an interest (which by this bill they are alleged to do), in the maintenance of that illegal act? I must own that I find it very difficult indeed to give way to the objection in this case. At the same time, if a rule has been laid down and is applicable, that in a case of this kind, an individual has not a right to sue on behalf of himself and others, when there is an injury done to the whole body—to the whole corporation—without having first attempted to get the concurrence of the whole corporation, it is not my province or duty to deviate from it.

[384] I do not at present feel persuaded that it is necessary to amend the bill, for it is quite manifest, that when any individual has the right to sue one, he must of necessity, in order that justice may be done, have the right to sue those who are partners in the wrong so alleged to be done. I should therefore on principle say, it is not necessary; and if there is not such a rule, I do not think I ought to lay it down in this case.

My present opinion is, that the rule does not apply; but I will look at the cases carefully, and mention the matter in the course of a day or two, if I find any reason to alter my opinion; if I do not, the demurrer must be overruled.

March 8. THE MASTER OF THE ROLLS:

I have considered this case, and see no reason whatever to alter the opinion I formerly entertained, that this bill may be sustained in its present form, though there has been no attempt to obtain the concurrence of the Company.

1850. *Jan.* 18, 19, 22.

HODGSON *v.* THE EARL POWYS.

(12 Beav. 392—397; S. C. 19 L. J. Ch. 356; 14 Jur. 906; on app. 1 D. M. & G. 6; 21 L. J. Ch. 17; 15 Jur. 1022.)

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[392] [THIS was a hearing on demurrer of a suit in which the plaintiff afterwards obtained an injunction, but that injunction was dissolved on appeal, as reported in 1 D. M. & G. 6.]

HARGRAVE *v.* HARGRAVE.

1850.
Jan. 21, 31.
Feb. 7.

(12 Beav. 408—413 ; S. C. 19 L. J. Ch. 261 ; 14 Jur. 212.)

Rolls Court.
Lord LANGDALE, M.R.

Upon the trial of an issue between an infant and an adult, terms of compromise were signed by their counsel, and the cause was withdrawn. The agreement, though such as the Court would have sanctioned, was not binding on the infant. The adult afterwards refused to be bound by the arrangement. A new trial was directed, and the adult party was ordered to pay so much of the costs of the issue, as had been rendered fruitless, and could not be rendered available on the subsequent trial.

[408]

On the trial of an issue, the common law counsel entered into an arrangement as to all the matters in dispute in the cause: Held, that the matters were not so distinct as to be beyond his authority.

THE question in this cause depended upon the legitimacy of the plaintiff (an infant), and an issue having been directed, the jury, on the 10th of February, 1846, found in favour of the plaintiff.

A second trial was afterwards directed, upon which the jury, on the 22nd of June, 1848, found for the defendant.

A third issue was then directed, which came on for trial on the 19th of June, 1849, on which occasion, the counsel for the plaintiff and defendant signed the following agreement: "The entire estate to be equally divided between the plaintiff and the defendant. Each party to bear all his own costs. The defendant to retain all rents received by or for him prior to the appointment of the receiver. The fund in the Court of Chancery and in the hands of the receiver to be equally divided between the plaintiff and the defendant. Rule of this Court, if necessary, to be drawn up for enforcing these terms. Order of the Court of Chancery, if necessary."

Upon this, each party withdrew a juror, and the trial was not proceeded with. The defendant was at first willing to carry the compromise into effect, but he afterwards refused so to do.

A petition was now presented by the plaintiff, praying that if the defendant elected to confirm and carry *out the compromise, a proper instrument might be executed; but if he did not, then that the issue might be tried, and that the defendant might be ordered to pay to the plaintiff his costs of preparation for the trial, on the 19th of June, 1849, and consequent thereon, and of this application.

[*409]

The plaintiff being still an infant, it was admitted that the agreement was not binding on him.

Mr. Turner and *Mr. Kyle*, in support of the petition, [cited *Furnival* v. *Bogle* (1), *Filmer* v. *Delber* (2), *Mole* v. *Smith* (3),

(1) 28 R. R. 34 (4 Russ. 142).
(2) 12 R. R. 688 (3 Taunt. 486).
(3) 1 J. & W. 673; see 28 R. R. 37 *n.*

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Colledge v. *Horn* (1), to show that the defendant was responsible for the act of his counsel and the costs which had been occasioned by his consent].

[410] *Mr. Lloyd* and *Mr. Glasse*, *contrà*, for the defendant.

The compromise was not binding on the plaintiff, an infant, and on the other hand the defendant is not bound by it for want of reciprocity: *Flight* v. *Bolland* (2). Again, the defendant's counsel had no authority, either express or implied, to enter into it. His authority extended no further than the matters in controversy in the issue, namely, the legitimacy of the plaintiff: here, the subject of the agreement is the estate and the rents, as to which counsel at law were not instructed. It would be most dangerous to hold that counsel are general agents to such an extent as to have an unlimited authority to bind their client in all their affairs.

[The cases of *Davenport* v. *Stafford* (3) and *Tygulden* v. *Terson* (4) were also cited.]

[411] *Mr. Turner*, in reply.

THE MASTER OF THE ROLLS:

With a slight exception, the agreement signed by counsel gave to the plaintiff the whole relief which he sought by his bill. The trial was auxiliary to the proceedings in this suit, and it is impossible for me to believe, that the counsel were not aware of what was the real matter in controversy between the parties, or that they were not furnished with full instructions. The principal difficulty I own is this: the plaintiff is an infant, and, according to the decisions here, this Court will not decree the specific performance of an agreement entered into between an infant and an adult, there being no mutuality or reciprocity; and if, therefore, this agreement had been entered into with perfect authority, it is not unreasonable to doubt, whether it could be enforced by this Court. That relief, however, is not sought by the petition, unless the defendant consents to it. It depends on the consent of the defendant, and would not then be sanctioned by the Court, unless the agreement were considered beneficial to the infant. It appears so clear, that this agreement would be beneficial to the infant, (not because it gave him a right to the whole relief claimed, but because it gave him the substantial part at once, and relieved him from all further expense

(1) 28 R. R. 606 (3 Bing. 119).
(2) 28 R. R. 101 (4 Russ. 298).
(3) 68 R. R. 173 (8 Beav. 503).
(4) 2 Dowl. P. C. 277; 4 Tyr. 309.

delay, and uncertainty,) that there is no ground for thinking that the Court would have interposed any difficulty on behalf of the infant.

From the affidavits, I cannot doubt, that, beyond the general authority which the defendant's counsel had, there was, either previously or subsequently, an adoption of or consent to the terms by the defendant. It is expressly stated, and not denied by the defendant, that he did, at one time, consent to the terms, and that he afterwards refused to be bound by them. The trial of the issue was put off, each party consenting to withdraw a juror, and by that act, founded on this agreement, the further proceeding on that trial was rendered impracticable on that day. The defendant then says, "I dissent, and will not carry the agreement into effect because it is an agreement on behalf of an infant, which cannot be carried into effect." The consequence of which is, that by the act of the defendant, the whole expense of the preparations for that trial was incurred in vain, except so far as it may be made available on a future trial. If any part can be used on a subsequent trial, it is a material consideration in respect of costs. [412]

The result is this: in consequence of the defendant having departed from the arrangement made at the trial, a considerable part of the expenses which had been incurred were rendered fruitless, and it became necessary to apply to the Court. This petition asks, if the defendant refuses to abide by the agreement, for leave to go on with the trial; and that the defendant may pay the costs incurred, and the costs of this petition. As to the first, there can be no doubt of the right of the plaintiff to go to another trial.

As to the second part, it has been objected, on behalf of the defendant, that the authority of counsel does not extend beyond the very subject-matter of litigation in the proceeding, and that in this matter, it extended only to the question of legitimacy, as to which alone *the issue was directed, and that, therefore, he is not responsible for the act of his counsel. In this case, the proceedings in the cause and the issue are so closely connected, that I do not think that this can be considered as an agreement relating to a distinct matter, and I am of opinion that the objection cannot prevail. [*413]

Another objection taken on behalf of the defendant was, that no order was drawn up, though one of the terms of the agreement was, that it should, if necessary, be made a rule of Court. After reading the cases cited, I think it has been determined, that it is unnecessary that such an agreement should ripen into an order of Court,

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before it can be made available. Is the withdrawal of a juror nothing? And is there not this fact, that the case being called on, was not proceeded with in pursuance of the agreement? I cannot think that this objection can prevail.

The only question is, what costs ought to be paid by the defendant to the plaintiff? I think a distinction ought to be made, and that so much of the costs of preparing for the trial, as, by the failure of the arrangement, have turned out to be wholly unavailable for a new trial, ought to be charged on the defendant, by whose act they have been rendered useless. With regard to the costs of this petition, I think I shall not do wrong in making them costs in the cause.

The order I therefore make is, that the third trial of the issue shall be proceeded with, and that the defendant shall pay to the plaintiff so much of the costs of preparing for the last trial, as cannot be made available for the trial of the issue to be had under this order, and that the costs of this petition shall be costs in the cause.

1850. *Jan.* 26.

Rolls Court.

Lord LANGDALE, M.R.

[414]

HALL *v.* HALL.

(12 Beav. 414—420.)

A partner having excluded his co-partner, an injunction was granted to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles.

Upon a disagreement, one partner, by letter, proposed to the other, either to retire or to refer to arbitration. The other partner in answer said, he concurred in the retirement, but subject to a condition as to the taking the accounts: Held, that the partnership was not dissolved.

ON the 20th of March, 1848, James and John Hall entered into partnership as brewers, on terms expressed in an indenture of that date. The defendant John brought in the whole capital; the plaintiff James was to devote his whole time to the business, as active partner, and the defendant John was enabled to decline such part of the active management as he should think fit. The profits were to be divided in equal moieties, and the deed contained an arbitration clause.

Disputes and disagreements occurred, which at length arrived to such a pitch, that, (to adopt the expression used in the judgment of the COURT,) there was, in November, 1849, on the part of the defendant, "a downright and absolute exclusion" of the plaintiff from the partnership business.

In this state of things, the plaintiff, James Hall, filed his bill against John Hall, praying that the articles of partnership might be

performed: that the defendant might concur in opening a joint banking account, in accordance with its stipulations, for an account and receiver, and for an injunction, to restrain the defendant "from doing any act which might obstruct or interfere with the plaintiff in the active management and conduct of the trade and business of the co-partnership, and from restricting the plaintiff in the exercise and enjoyment of his rights as such co-partner." HALL v. HALL.

By his answer, the defendant, amongst other things, insisted that the partnership had been dissolved by a *letter written by the plaintiff on the 24th of May, 1849, and the answer of the defendant thereto on the 28th of the same month. The plaintiff's letter contained the following passage: "As I see but little prospect of any understanding while we remain together in the business, it will be more for the happiness and comfort of both that a separation should take place. I am willing to retire from it, and will endeavour to meet your views, or, should you rather have it settled by arbitration, if you will appoint one party, I will another; so that the matter may be arranged without any other feeling than friendship on both sides. As it is not my wish to lose much time before I make application for other employment, your favour of an answer which way you would like it done, so as to bring it to a conclusion," &c. [*415]

The material parts of the defendant's letter in answer were as follows: "I concur in your opinion, and believe that your retirement would be most conducive to that good feeling, which I would wish for the future to exist between us. I still must make it a condition upon which these arrangements are to be made, that the cash accounts between us should be first adjusted. I appoint Mr. Messum to attend to this business." The plaintiff after this, continued to take part in the management of the trade, until his exclusion in November, 1849.

A motion was now made for an injunction, "to restrain the defendant from doing any thing which might obstruct or interfere with the plaintiff in the active management of the trade and business of the said co-partnership, and from restricting the plaintiff in the exercise and enjoyment of his rights as such partner," &c. &c.

Mr. Turner and *Mr. Welford*, in support of the motion, argued, that the Court would decree the specific performance of articles of partnership: *England* v. *Curling* (1); and in a case of exclusion, would, before the hearing, interfere by injunction to prevent a [416]

(1) 68 R. R. 39 (8 Beav. 129).

HALL v. HALL.

continued violation by one partner of the partnership contract: *Const* v. *Harris* (1).

The plaintiff does not seek a dissolution, but the defendant, by his conduct, is unjustly seeking to force one.

Mr. Lloyd and *Mr. Bagshawe, contrà*, argued,

1. That it appeared that the defendant had been induced to enter into the partnership by fraudulent misrepresentations of the plaintiff as to the capital to be brought into the concern by him, and that as the Court exercised a discretion in cases of specific performance, it would not interfere in the present instance. 2. That the plaintiff had himself violated the terms of the agreement; and, thirdly, they justified the exclusion, on the ground of there having been a practical dissolution of the partnership by the letters referred to.

Mr. Turner, in reply, said, that there was no cross bill to impeach the articles, and as to the dissolution, he was stopped by the COURT.

THE MASTER OF THE ROLLS:

In this case, as in all others of the same kind, the duty I have to perform is to me an extremely painful one, and for this reason: I know that I cannot exercise the jurisdiction of the Court, without necessarily producing very great pecuniary loss to both parties, and
[*417] *peculiarly so to the partner who has brought in the whole capital. But I do not know how to avoid exercising the jurisdiction of the Court, without at once declaring that any wealthy partner may treat his co-partner and all his rights just as he pleases, according to his own arbitrary pleasure. If the Court of Chancery cannot interfere in partnership affairs without great loss to both parties, is it fitting that one of them should in the mean time be permitted to act in such a manner, as to make it impossible for the other to enjoy his undoubted rights, and insist on having his own way in every thing, even to the exclusion of his co-partner. This sort of proceeding cannot really be allowed.

I again repeat, that which I have on similar occasions observed with a view of rendering a service to both parties: I recommend them to settle their differences as fast as they can, by coming to some reasonable agreement with one another. I do not know, in the situation of these parties, what it may be expedient to do

(1) 24 R. R. 108 (T. & R. 496).

hereafter, but I shall be most anxious to extend any authority I have to extricate them from the very serious difficulties in which they seem now to be involved.

This partnership commenced on the 20th of March, 1848. The defendant is a person of experience in the business of a brewer, and the plaintiff is a young man and a connection of the defendant. It appears that they proposed to form this partnership, the plaintiff having no capital to bring into the concern. They came to an agreement, the terms of which are stated in the articles, and the partnership commenced upon that footing. Now the defendant being a person of mature age and experience, and having furnished the whole capital, might probably have felt a disposition, notwithstanding the agreement, to assume a very considerable *authority. [*418] However that may be, it appears, that disputes and differences had arisen to such a height in the month of May, 1849, that the plaintiff was willing, and even proposed to the defendant, for the happiness and comfort of both, either to retire, or to have the disputes settled by arbitration: he requested to know the views taken by the defendant, and to be informed which way he would like the matter to be settled. If that was an absolute offer, the defendant had nothing to do but to accept it. But the plaintiff wishing to know the view of the defendant in that respect, opened a negotiation, stating his own willingness either to retire or to go to a reference, and he desired to know the view taken of it by the defendant. The defendant, after some improper delay, says, in effect, "I concur in your opinion, and believe that your retirement would be most conducive to a good feeling between us; but I still must make it a condition upon which these arrangements are to be made, that the cash accounts between us should be first adjusted." Now, am I, because this gentleman is a brewer and not a lawyer, to consider, that, notwithstanding he imposes a preliminary "condition," this letter is to be construed as an unconditional acceptance by the defendant of the plaintiff's absolute offer? Counsel are compelled to argue things very much against their own judgment, and I am persuaded it must have been so upon this occasion, for in my opinion, this letter did not amount to a dissolution of the partnership, or any thing like it.

The matter afterwards seems to have gone on for a considerable time; neither party doing exactly what was right. It is very immaterial to go into a minute *examination of these things, [*419] because ultimately they come to a downright and absolute exclusion of the plaintiff, and the defendant says, you shall not interfere in

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the business at all. It is clear to me, that it is not proper that such a state of things should exist between partners, and I am of opinion, that the plaintiff has a plain right to the protection of this Court. Having such a right, the Court ought not to interfere more than is absolutely necessary for the protection of these parties. I think I may interfere to the extent of preventing the defendant (as in the case before Lord Eldon) from obstructing or interfering with the plaintiff in the exercise of his right under that agreement. Though it is clear that the defendant ought not to do that which he has done, I will not go to a greater extent than prevent him from applying any portion of the partnership funds for any than the purposes of the partnership, and from obstructing the plaintiff in the legal exercise of his rights under the deed of partnership. I do not wish to go further than it is absolutely necessary, but I think this absolutely necessary for the protection of the plaintiff.

After some further discussion, the injunction was granted in the following form: Restrain the defendant from applying any of the monies and effects of the co-partnership, otherwise than in the ordinary business, and from obstructing or interfering with the plaintiff in the exercise and enjoyment of his rights under the partnership articles.

[Some further proceedings in this suit are reported in 3 Mac. & G. 79, where an order appointing a manager of the business was discharged by Lord TRURO, L. C.]

1849. *Nov.* 12, 13, 14.
1850. *Jan.* 12.

Rolls Court.
Lord LANGDALE, M.R.
[433]

BAILEY *v.* THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

(12 Beav. 433—443; S. C. 6 Rail. Cas. 256; 19 L. J. Ch. 377; 14 Jur. 119.)

In an amalgamated Railway Company there were three classes of shareholders. A shareholder of one class filed a bill on behalf of himself and all others of the class, stating that an unfair and unnecessary call had been corruptly made on that class, which some had paid, but that the plaintiff had refused to pay it, and praying that an account might be taken to ascertain the propriety and necessity of the call, and for an injunction: Held, that this was an attempt to induce this Court to interfere in the internal management of the affairs of a continuing Company, and a general demurrer to the bill was allowed.

Held, also, that the shareholders of the same class as the plaintiff who

had paid the call and the other two classes of shareholders ought to be represented.

On demurrer, this Court adjudicates on the statement of a Railway Act as alleged in the bill, and will not go out of the record.

BAILEY v. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

THIS case came before the Court upon demurrer to the whole bill. The plaintiff sued on behalf of himself and all others, the holders of shares of 31*l.* each in the Company, except such, if any, of the defendants as were holders of such shares. The effect of the statements of the bill was as follows: By four several *Railway Acts, [*434] certain railways were authorised to be made, and by an Act of Parliament, passed in the year 1847, the several Railway Companies became incorporated with the Birkenhead, Lancashire, and Cheshire Junction Railway Company, and the capital became vested in that Company, in shares which were made to consist of three classes: viz. shares of the nominal value of 27*l.* 10*s.* each, in respect of which nothing was due from the holders: shares of the nominal value of 22*l.* each, in respect of which 6*l.* 10*s.* was due, and shares of the value of 31*l.* each, in respect of which 21*l.* was due.

The different shareholders were entitled to profits, in proportion to the sums actually paid on their shares. The directors of the Company, as newly constituted, were elected according to the provisions of the Act, and a call of 1*l.* 5*s.* per share, payable in October, 1847, was made in respect of the shares of 31*l.* each, and a call of 3*l.*, payable in December, 1847, was made in respect of the shares of 22*l.* each.

In May, 1848, the directors made a further call of 2*l.* 5*s.* per share, payable in June, 1848, on the shares of 31*l.* each.

The bill alleged, that James Bancroft and other directors formed a scheme to conduct the affairs of the Company, without regard to the general benefit of the shareholders, and in such a manner as to benefit the holders of the shares of 27*l.* 10*s.* and 22*l.* each, to the prejudice and injury of the holders of the shares of 31*l.* each; and that they took measures to obtain a majority *in the board of [*435] directors, to depreciate the market value of the shares of 31*l.* each, and cause an alarm amongst the holders of such shares, with a view to induce them to consent to certain disadvantageous terms, (which they intended to propose), for the relinquishment or modification of the interests of such shareholders, for the benefit of the holders of the shares of 27*l.* 10*s.* each, and 22*l.* each. An attempt to effectuate such scheme was alleged to have been made at a general meeting held in November, 1848, and afterwards, by causing a bill to be introduced into Parliament, to the effect mentioned in the bill:

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that an opposition being made by holders of the shares of 31*l.* each, a meeting was held on the 10th of February, 1849, and a resolution was passed, to make a call of 10*l.* per share in respect of the shares of 31*l.* each, one half of such call to be paid on the 16th of March, and the other half on the 16th of April then next.

The bill alleged, that this call of 10*l.* was not required for the execution of the works of the Company, which were intended to be executed, but was made only to intimidate the holders of the shares of 31*l.* each.

And it was further alleged, that in consequence of certain works being abandoned, the amount of the call actually required was not so great as the call which had been made. But that the call having been made, certain of the holders of shares of 31*l.* each, who had not paid up the money due upon them, had made the payments called for; but others had refused and still refused to do so, alleging the payments not to be required for the purposes of the Act. The bill set forth statements, from which it seemed intended to be [*436] inferred, that the calls were unnecessary, and that the estimate *of liabilities (suggested as an excuse for the call) had been exaggerated, and that the real motives of the directors in making the calls, had been to injure the holders of the shares of 31*l.* each, by compelling them to consent to a relinquishment or modification of the interest which they had in their shares.

It charged, that the respective holders of shares of 27*l.* 10*s.* each, and 22*l.* each, had artfully contrived to obtain a majority of votes over the holders of shares of 31*l.* each, and that in consequence of the existence of such majority, most of the holders of shares of 31*l.* each had considered it useless to attend, and had not attended any meeting of the Company since August, 1848; and that the proceedings at all subsequent meetings of the Company had been wholly controlled by the holders of shares of 27*l.* 10*s.* each and 22*l.* each.

The bill stated, that the plaintiff, who was the holder of 487 shares of 31*l.* each, and others, had refused to pay the call of 10*l.* thereon, and the directors had threatened to bring actions against them, and to forfeit their shares; but that certain of the 31*l.* shareholders, had paid under protest, and insisted on having the same repaid.

It alleged, that part of the lines had been completed, but that the remainder had been abandoned, and that the compulsory powers for making it had expired.

The bill was filed by the plaintiff, on behalf of the 31*l.* shareholders, against the Company and the ten directors alone; but it alleged, that the 31*l.* shareholders were very numerous, and could not be made parties, but that their interests were identical with those of the plaintiff; and as to the 27*l.* 10*s.* and 22*l.* shareholders, [*437] the bill charged as follows: "That the number of holders of the said shares of 27*l.* 10*s.* each and 22*l.* each were so great, and their rights and liabilities were so subject to change, by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties to this suit, and so to do, would render it impossible to bring this suit to a termination; but their interests were identical with the interests of the persons, defendants thereto, all of whom were holders of some of the shares of 27*l.* 10*s.* each, and 22*l.* each."

The bill prayed, that it might be ascertained, under the direction of the Court, whether any and what part of the call of 10*l.* per share was required for any of the purposes to which monies to be raised by means of the shares of 31*l.* each, were lawfully applicable: and that the defendants might, thereupon, be perpetually restrained, by the injunction of the Court, from prosecuting any proceedings against the plaintiff, or those for whom he sued, for enforcing payment of such call, other than such part as might be so required, and from declaring, confirming, enforcing or otherwise acting upon, any forfeiture of any of the shares of 31*l.* each, in respect of any part of such call, other than such part as might be so required, and that any part of such call which had been paid, other than such part as might be required, might be repaid. And that in the meantime, and until the part so required should be ascertained by the direction of the Court, the defendants might be restrained from prosecuting any action in relation to such call. It also sought to restrain the defendants from making any further call, and declaring any forfeiture, or commencing any action in relation to any such further call, and for further relief.

To this bill the defendants demurred for want of equity, and also, on the ground that the 27*l.* 10*s.* and 22*l.* shareholders or a sufficient number of each class to represent the remainder, were necessary parties. [438]

Mr. Turner and *Mr. Glasse*, in support of the demurrer, [cited *Foss* v. *Harbottle* (1); *Mozley* v. *Alston* (2); *Lord* v. *The Copper*

(1) 62 R. R. 185 (2 Hare, 461, 497). (2) 65 R. R. 520 (1 Ph. 790).

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Miners' Company (1); *Const* v. *Harris* (2); *Waters* v. *Taylor* (3); *Evans* v. *Stokes* (4), and other similar cases].

[439]

Mr. R. Palmer and *Mr. F. H. Goldsmid*, in support of the bill:

This is not a bill to interfere with the internal management of the Company, but one to prevent the commission of a fraud upon a particular class of shareholders. * * Relief was granted against a corporation in respect of such acts, in the case of *Colman* v. *The Eastern Counties Railway Company* (5), and a Company of this sort is not to be regarded as a common partnership, *Cohen* v. *Wilkinson* (6), which is similar to the present. The act complained of "is not within the common contract" between the parties, and, therefore, the majority cannot bind the minority: *Ex parte Morgan* (7). * *

[440]

Mr. Turner, in reply.

THE MASTER OF THE ROLLS:

I will consider the case.

1850. *Jan.* 12.

THE MASTER OF THE ROLLS:

This bill proceeds upon the notion, that it is within the jurisdiction of this Court to take the accounts, and make the enquiries necessary for the purpose of ascertaining, whether, under the circumstances to which the Company is reduced and in a continuing concern, it is proper, in the due management of the affairs of the Company, to raise money by way of call from the shareholders whom the plaintiff assumes to represent, and who have neither paid up their calls, nor taken the trouble to attend the meetings, in which the question of making such calls was discussed. It appears to me, that this case can only be considered as an attempt to induce this Court to interfere in the internal management of the affairs of the Company, and to take upon itself to determine a question, which might well and ought to be determined by the shareholders themselves at general meetings. The only foundation for relief in this

*441]

Court is the allegations that the calls, in the circumstances *which have happened, are not wanted, and that the plaintiff and other shareholders of the class to which he belongs are or are likely to be defrauded, by a scheme formed by the other shareholders, seeking

(1) 78 R. R. 270 (2 Ph. 740).
(2) 24 R. R. 108 (T. & R. 496).
(3) 13 R. R. 91 (15 Ves. 10).
(4) 44 R. R. 3 (1 Keen, 24).
(5) 76 R. R. 78 (10 Beav. 1).
(6) *Ante*, p. 54.
(7) 84 R. R. 50 (1 Mac. & G. 225).

in some way to benefit themselves or the other classes of shareholders, to the prejudice of the plaintiff, and those for whom he sues, and proceeding to enforce calls in pursuance of such alleged fraudulent scheme.

The bill contains many allegations of fraudulent and improper motives: an intention to prejudice one class of shareholders for the benefit of the others. But these allegations do not rest on any specific facts sufficient to support the imputations; and the plaintiff, so far from stating that any attempts have been made to bring the matter under the consideration of the shareholders at large, or to procure any improper resolution of the directors in the management of the affairs of the Company to be rescinded, states the contrary, and that most of the shareholders for whom he sues have not attended the meetings, or made any attempt to correct any error which may have been made.

It does not appear, from any facts distinctly alleged in this bill, that the holders of shares of 31*l.* each have made payments in proportion to the holders of the other shares, or that they are not now more in arrear than the others, or that it may not be right and just to make and enforce payment of the calls complained of, either for the purpose of carrying on works which it may be necessary to complete, or for the purposes of paying debts or answering liabilities which must be provided for; and the plaintiff, not thinking fit to call or attend meetings, in which any questions of this sort may be properly settled, prefers coming into *this Court, for an enquiry to [*442] ascertain whether any part of the call for 10*l.* is required, for the purposes to which the monies to be so raised are lawfully applicable, and for an injunction to restrain any proceedings at law to recover the amount of such calls.

It is indeed alleged, that there is an intention to abandon part of the works, for the completion of which the powers were granted to the Company. This may be quite unauthorised, but it is not sufficient to show, that the enforcement of the call may not be necessary for lawful purposes, and, even supposing the plaintiff to have some well founded reason to complain of what has been done, it appears to me that he cannot have the remedy for which he asks.

This bill contemplates the continuance of the Company, for at least some of the purposes for which it was incorporated, and the maintenance of some of the works which it was authorised to make, and it would, I think, be impossible for this Court to entertain

BAILEY v. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

jurisdiction in such a case as this, without assuming authority to interfere in the internal management of all Companies and partnerships, whenever a question arose as to the proper amount of a call required for the lawful purposes of the Company.

I am therefore of opinion, that the plaintiff is not entitled to any relief upon this bill, and that the demurrer for want of equity must be allowed.

I think also the bill is defective as to parties, in suing on the behalf of all the holders of shares of 31*l.* each, as well those who have paid the calls as those who have not, and in not sufficiently [*443] alleging, that the *holders of the other shares are represented by the defendants.

Mr. R. Palmer asked leave to amend.

The MASTER OF THE ROLLS refused it.

1850.
May 22, 24, 25, 27.

Rolls Court.

Lord LANGDALE, M.R.

[460]

GRAHAM *v.* THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.

(12 Beav. 460--470; see S. C. on app. 2 Mac. & G. 146; 2 H. & Tw. 450; 20 L. J. Ch. 445; 14 Jur. 494.)

[SEE the report of this case on appeal in 2 Mac. & G. 146, to be contained in Vol. 86 R. R.]

1850.
March 12.
April 15.

Rolls Court.

Lord LANGDALE, M.R.

[476]

ROWLEY *v.* ADAMS.

(12 Beav. 476—479.)

The case of *De Visme* v. *De Visme* (1) must be acted on with some caution, and it is not in every case of delay in the delivering of a sufficient abstract, that a vendor is to lose the interest which he has stipulated for.

Upon a sale under the Court, on the 14th of September, there was a condition that the purchaser should confirm the report, and before the 10th of November pay his purchase-money and interest from the 29th of September, and be entitled to the rents from that time; and "under no circumstances" was he to be excused paying interest from that time. The purchaser was unable to obtain and serve the order of confirmation until the 29th of November. The abstract was delivered on the 6th of December, and the requisitions finally answered on the 17th of January: Held, that there was no such delay on the part of the vendor as to release the purchaser from payment of interest.

ON the 14th September, 1849, some property was sold by auction in these suits.

(1) 84 R. R. 83 (1 Mac. & G. 336).

By the conditions of sale, the purchaser was to obtain the confirmation of the report, and, on or before the 10th of November, 1849, pay in his purchase money, with interest, from the 29th of September, 1849, and the condition proceeded thus: "And thereupon the purchasers shall be entitled to the rents from the 29th of September, 1849, and under no circumstances, shall the purchaser be excused from paying interest, from that day until payment of the purchase money."

The purchaser was limited to twenty-one days to deliver objections to the title.

Mr. Wood became the purchaser; but, in consequence of the offices being shut during the long vacation, and by reason of an application by a third party to open the biddings, the order absolute was not obtained till the 22nd of November, and it was served on the 29th. The abstract was delivered on the 6th of December; the purchaser's requisitions were delivered on the 21st, and answered on the 31st: further requisitions were delivered on the 10th of January, which were answered "without prejudice" on the 17th, and on the 18th, *notice of motion was given to pay the purchase-money into Court without interest. [*477]

The only question was, whether the purchaser was bound to pay interest on his purchase-money from the 29th of September.

Mr. Turner, for the purchaser, argued, on the authority of *De Visme* v. *De Visme* (1), that there ought to be some diminution in the interest, the delay having been created by the default of the vendor to furnish a complete abstract.

Mr. Roupell, and *Mr. Erskine, contrà*:

There is no reason, in this case, for deviating from the express terms of the contract between the parties, for there has been no wilful negligence on the part of the vendors in completing the contract. The present case differs from *De Visme* v. *De Visme*, not only in the absence of all improper delay, but in this: that in the present case, no time is specified for the delivery of the abstract, and the non-delivery before the 6th of December is attributable to the purchaser, who did not serve the order absolute until six days previously. The subsequent abstract was not absolutely necessary, having regard to the special conditions of sale, and was delivered "without prejudice," and merely for the better satisfaction of the purchaser.

(1) 84 R. R. 83 (1 Mac. & G. 336).

ROWLEY v. ADAMS.

Mr. Turner, in reply.

Jones v. *Mudd* (1) was also cited.

[478] THE MASTER OF THE ROLLS:

The doctrine of the case of *De Visme* v. *De Visme* was not new: it merely established a principle as to which a considerable difference of opinion had previously prevailed. The COURT had sometimes refused interest to a vendor causing the delay, although he had thought fit to insert in his conditions of sale that he was to have it, "if from any cause whatever" the completion should be delayed. In other cases, it was assumed that the contract was binding on the parties, and that the words "from any cause whatever" would even include those brought about by the default of the vendor himself, so that he was thus profiting by his own negligence.

I hope the case of *De Visme* v. *De Visme* has now settled the point; but it is, nevertheless, necessary that that case should be acted on with some caution; otherwise, no negociation could take place between the solicitors, for the purpose of better satisfying the purchaser as to the title, without entangling the vendor in a question of interest. It cannot be laid down, that in all cases where a sufficient abstract is not delivered in time, the vendor is to lose the interest which he has stipulated for.

I will read over the affidavits and the case of *De Visme* v. *De Visme*. There is no question here as to whether a good title can be made, or as to what is necessary to perfect it; a good title is admitted, and the only question is, whether the delay on the part of the vendor has been such, as ought to deprive him of interest.

It is not to be forgotten that the purchaser is, at all events, entitled to the rents from September.

April 15.

[479] The MASTER OF THE ROLLS said, that he had carefully read the affidavits, but could not fairly come to the conclusion, that such a delay was imputable to the vendor, as to relieve the purchaser from the payment of interest.

(1) 28 R. R. 22 (4 Russ. 118).

HENNET *v.* LUARD.

(12 Beav. 479—481.)

1850.
April 15.

Rolls Court.

Lord LANGDALE, M.R.

[479]

A defendant offering the plaintiff all the relief specifically sought by his bill, moved to dismiss the bill without costs, or that the plaintiff might apply respecting them. The plaintiff then insisted on a further demand, which might be had under the prayer for general relief or by amendment. The COURT refused the motion with costs, but intimated that this proceeding must be considered at the hearing.

The decision in *Sivell* v. *Abraham* (1) adhered to.

THE plaintiff, by his bill prayed, that upon payment by him to the defendants the Banking Company of 8,000*l.* which he offered to do, the Banking Company might deliver up to him sixteen railway bonds of 1,000*l.* each, which had been deposited with them, and for an injunction to restrain their parting with them, and for general relief.

On a motion for an injunction, an order was made by arrangement, dated the 25th of January, 1849, whereby eight of the bonds were to be lodged in Court, and the remainder were to be retained by the Banking Company until payment of the 8,000*l.* On the 25th March, 1849, the plaintiff paid the 8,000*l.*, and the eight bonds were delivered up to him.

The defendants, the Banking Company, by Luard, their public officer, now moved, that upon payment into Court of the balance of interest received on the bonds, and upon delivery out of the eight bonds now in Court, the bill might stand dismissed, as against them without costs; or that, if the plaintiff considered he had any claim for costs against Luard, then that he might make an application within a limited time to establish it, and *in default, that the bill might be dismissed without costs. [*480]

The motion having been now brought on, the plaintiff insisted, that the defendants were also liable for 339*l.*, the amount of coupons which he now alleged had been cut off the bonds. This subject of complaint was not stated or charged in the bill.

Mr. Roupell and *Mr. Stevens*, in support of the motion:

The defendant offers all the relief asked by the bill: therefore the suit ought not to go on. If the only question be as to the costs, the plaintiff ought not to proceed with the suit, but should make a special application, in the way pointed out in *Sivell* v. *Abraham* (1).

(THE MASTER OF THE ROLLS: I do not at all recede from what I am reported to have said in that case.)

(1) 68 R. R. 215 (8 Beav. 598).

HENNET v. LUARD

As to the coupons, nothing is sought respecting them by the bill; and it is stated, that that sum was received by Cooper, one of the co-defendants, when he had no connection with the Bank.

Mr. Turner and *Mr. Terrell, contrà :*

The defendant does not offer to give the plaintiff all he claims, and therefore the suit cannot be stayed. The plaintiff insists, that the defendants are liable for 339*l.*, the amount of coupons, which, he says, were cut off the bonds; and although this matter is not specifically charged by the bill, still the prayer for general relief will cover it; and besides, the plaintiff is entitled to amend his bill, and will do so, if he finds it necessary.

[481]

Mr. Roupell, in reply.

THE MASTER OF THE ROLLS :

This motion seems to me so laudable in its intent, that I think it deserving of great consideration; but, at the same time, it is impossible for me to depart from the rules which have been established in cases of this kind. I think it perfectly clear from what is stated, that, by the prosecution of this suit, the plaintiff may claim (whether successfully or not I cannot tell) something more than is offered to him by the terms of this notice of motion. That being so, the offer is not to give the whole of that which the plaintiff has a right to claim; and, consequently, I cannot grant the motion, consistently with what I conceive to be the established practice of the Court.

The only question which remains is, whether the defendant, who fails in this motion, ought to pay the costs; and though I am very reluctant to make the order, I think, under all the circumstances, that the party who made this motion must pay the costs of it.

However, when the cause comes on for hearing, I must bear in mind what has been offered on the present occasion, in order that I may then judge of the propriety of the plaintiff's persisting in prosecuting this suit.

PICARD *v.* MITCHELL.

(12 Beav. 486—488.)

1850, *April* 22.

Rolls Court. Lord LANGDALE, M.R.

A Railway Company took lands, the subject of an administration suit, in which lands infants and married women were interested, and a reference was made to the Master in the cause, to ascertain what course was the most beneficial for the parties under disability. The Company was directed to pay all the costs, charges, and expenses of the petition and reference.

[486]

In 1830, Richard Galcon, being seised of a real estate at Knaresborough (subject to certain rent charges and legacies created by the will of his father), made his will, by which he devised it to trustees on certain trusts.

A suit was instituted for the administration of his estate, and a decree was made in 1842, referring certain matters to the Master, who made his report in 1845.

In January, 1847, the Leeds and Thirsk Railway Company, under the provisions [of] the Lands Clauses Consolidation Act, 1845, gave notice to the parties in possession of the property, that the Company required to purchase, and demanding the particulars of the estates and interests therein, and offering to treat for the purchase and compensation. The notice stated, that in default of compliance, the amount would be ascertained in the manner provided for by the Lands Clauses Consolidation Act, 1845.

On the 30th March, 1847, an order was made in the cause, upon the petition of some of the parties interested, by which it was referred to the Master to ascertain, whether it was most for the benefit of the *parties being infants and married women, that the Company should be required to take the whole of the property, and to determine by which of the modes the compensation ought to be ascertained, and directions were given for ascertaining it accordingly.

[*487]

The parties proceeded before the Master, and a sum of 910*l.* was ultimately awarded them by arbitration, which was paid into Court by the Company. The Master made his report in 1849. The title being accepted, a petition was now presented, praying that the money might be invested, and the dividends paid according to the rights of the parties; and for a reference to tax the petitioners, and the plaintiffs and defendants to this cause, respectively, their costs, charges and expenses, of and incidental to the taking and compulsory purchasing of the premises by the Railway Company, and of and incidental to the former petition, and to the reference to the Master thereby directed, and of the reference to the arbitrator, and of the agreement of reference, and of this application, and of the

PICARD v. MITCHELL.

conveyance; and that such costs, charges and expenses might be paid by the Railway Company. The petition set forth at length the Master's report, containing all the proceedings, which occupied eight brief sheets of the present petition.

Mr. Turner and *Mr. Hallett*, in support of the petition.

Mr. Walpole and *Mr. Tillotson, contrà*, objected to the payment of the costs asked, alleging that a considerable portion had been unnecessarily incurred.

Mr. Turner, in reply.

* * * * *

[488] THE MASTER OF THE ROLLS:

Primâ facie, all the expenses ought to be paid by the Company who have occasioned them. Where public Companies, either for the public good or their private profit, come and violently take the property of others, whether they like it or not, they ought to indemnify the persons against all the expenses which may be occasioned by such a proceeding.

But if a party proceeds in a wilful and extravagant way to incur costs quite unnecessarily, the Court will not allow them, and will refer it to the Master to enquire whether any and what unnecessary costs have been incurred.

Mr. Walpole:

Such a reference would only increase the costs.

THE MASTER OF THE ROLLS:

Then let the order be made according to the prayer of the petition.

1850.
March 7.
May 23.

Rolls Court.

Lord LANGDALE, M.R.

[497]

MURROW *v.* WILSON (1).

(12 Beav. 497—498.)

A plaintiff described himself as living abroad. Having given notice of a motion the defendant appeared and asked for time to answer the affidavits, and he afterwards filed affidavits in opposition: Held, that he had not thereby waived his right to security for costs.

A defendant does not, by simply defending an application against him, lose his right to security for costs.

THE plaintiff, in his bill, filed on the 13th of February, 1850, described himself as living at Hong Kong.

(1) *In re Home Assurance Association* (1871) L. R. 12 Eq. 112, 25 L. T. 199.

He gave notice of motion for an injunction, and on the 13th of February, 1850, filed an affidavit in support of the application. The defendant appeared, and applied for, and obtained time to answer the affidavit, and afterwards filed an affidavit in opposition: he also appeared on the motion on the 22nd of February, when it was refused with costs.

MURROW v. WILSON.

The defendant, on the 27th of February, 1850, obtained an order of course, that the plaintiff should give security for costs.

The plaintiff now moved to discharge the order, on the ground that the defendant, by his appearance and filing an affidavit in opposition to the motion, and by subsequent appearance thereon, had waived his right to security for costs.

Mr. Glasse, in support of the motion. * * *

Mr. Goldsmid, contrà, [cited *Ex parte Seidler* (1)]. [498]

Mr. Glasse, in reply.

THE MASTER OF THE ROLLS:

The question is, whether, in consequence of what took place, the defendant is to be considered as having waived his right to security for costs. I wish for further information as to the case of *Ex parte Seidler*. I will inquire into the circumstances of that case. It does not appear from the report, whether the application was made at the time the petition came on, or afterwards.

THE MASTER OF THE ROLLS: *May* 23.

This was a motion to discharge an order that the plaintiff should find security for costs. The objection taken was, that the defendant, before he obtained the order, appeared on a notice of motion made by the plaintiff, and obtained time to answer affidavits. I am of opinion that this did not deprive him of his right to security; it might be otherwise, if he had originated proceedings of his own. As to the case of *Ex parte Seidler*, it is not entered in the Registrar's book. I consider that a defendant does not, by simply defending an application made against him, lose his right to security for costs.

The order must, therefore, be sustained, and the motion refused with costs.

(1) 56 R. R. 25 (12 Sim. 106).

1850.
April 30.

Rolls Court.
Lord
LANGDALE,
M.R.
[499]

ASKHAM *v.* BARKER (1).

(12 Beav. 499—504.)

A father had a power of appointing to any of his children. Having, in breach of trust, obtained possession of part of the trust funds, he, in 1834, appointed that part to his daughters, in exclusion of his son, under an agreement, that that part should afterwards be conveyed to him, in exchange for an estate of less value. In 1844, he executed a second appointment, reciting the previous dealing with the fund, and he thereby appointed the remaining portion of the trust property "and all other" the property comprised in the settlement, to his daughters: Held, that the first appointment was void; and, secondly, that the portion of the property comprised therein was not appointed by the second deed.

THIS case came before the Court upon general demurrer to the whole bill, which, in effect, stated, that by a settlement made on the marriage of William Askham and Elizabeth his wife, certain property was vested in trustees for the husband and wife for their respective lives, with remainder to all and every or such one or more of the children of the marriage, in such shares and with or without power of revocation as William Askham should, by deed &c., appoint, and, in default, to the use of all and every the children equally.

In 1834, the trustees had, in breach of trust, lent a portion of the trust money to William Askham. At this time there were five children of the marriage, viz. the plaintiff John and four daughters.

The bill alleged, that the surviving trustee of the settlement was desirous of retiring and being released from his liability under the breach of trust, and that, in order to release such trustee, and to protect William Askham the father from being called on to pay the amount due from him, it was agreed between the father and his four daughters, that the father should appoint to his four daughters, so much of the trust fund as was then in his hands, upon an agreement, that the appointees should make no claim
[*500] against the trustee, and should *not call on the father to pay the amount; and it was agreed, that immediately after the appointment, the sums appointed should be assigned to the father, ostensibly in exchange for some real estate belonging to him, of less value than the fund appointed.

On the 18th March, 1834, William Askham accordingly appointed the trust funds then in his hands to the four daughters, and on the 25th March, 1834, he conveyed real estate belonging to him to the four daughters, in reversion after his death; the daughters, on their part, thereby assigned to their father the shares of the trust funds which had previously been appointed to them.

(1) *Roach* v. *Trood* (1874) 3 Ch. D. 429, 34 L. T. 105.

On the 25th of March, 1834, new trustees were appointed.

One of the daughters afterwards died.

On the 19th of April, 1844, William Askham executed a second appointment of the trust funds, whereby, after reciting the previous dealings with the fund and the appointment in 1834, and that William Askham the father was desirous of making an appointment of such of the said settled estate, monies and premises as remained unappointed, and that the plaintiff John Askham, being then entitled under the said settlement as tenant in tail, his father considered him to be fully provided for, William Askham appointed, *nominatim*, that the funds not comprised in the previous appointment, "and all other the sum and sums of money, messuages, lands, tenements, and trust estates whatsoever comprised in or affected by the said recited indenture of settlement, over or upon which he the said William Askham had a power of appointment or disposal, *should go and remain, immediately from [*501] and after his decease," unto his three daughters.

William Askham died in 1848, and the plaintiff John Askham, his only son, who took nothing under either of the two appointments, filed this bill, insisting on the invalidity of the first appointment of 1834, and praying a declaration that it was a fraudulent exercise of the power of appointment, and that the deed of exchange was void, and that the trust monies comprised in the appointment of 1834 were divisible as in default of appointment. It also sought to make the estates of the father and trustees liable as for a breach of trust.

To this bill two of the defendants demurred for want of equity.

Mr. Roupell and *Mr. E. B. Denison*, in support of the demurrer. * * *

Mr. Turner and *Mr. Freeling* were not heard in support of [502] the bill.

THE MASTER OF THE ROLLS:

In this case the father may have had a perfectly good intention, and may have been desirous of doing that which was for the benefit of all the family. The plaintiff, the eldest son, was perfectly well provided for, and it was an act of justice in the father, as far as he could do it in a proper manner, to provide for his other children. But the question is, how is this Court to treat this execution of the power?

ASKHAM v. BARKER.

The power might have been exercised exclusively in favour of any of the children; and if it had not been mixed up with any private interest or separate concerns of the father, he might no doubt have appointed the whole property to his daughters, or any of them, to the exclusion of the son. But unfortunately, he had got into difficulties, and found himself under the necessity of borrowing money from the trustees. He afterwards executed this power in such a manner, as to relieve him personally from the difficulty in which he was placed, and he personally obtained the advantage of that relief, from the persons in whose favour he executed the power. Such a transaction cannot stand. Wholly independently of any particular charge of fraudulent intention, or any thing of that kind, it is a thing which this Court cannot safely permit. It cannot allow a person who is to execute the power of
[*503] selection *to derive a private and separate benefit for himself by its execution. I think it plain that he obtained an advantage for himself by his execution of the deed of 1834. It has been ingeniously argued, that the appointment which was at first invalid, was afterwards made valid. What happened was this: the father had executed this power in such a way that this Court would not permit it to stand, and, because it was capable of being set aside and declared fraudulent by this Court, I am asked to treat it as if it had never been executed at all, and as if a future execution of the power were a perfectly free thing: as if the matter were open, and nothing had been done; and further, that because there was no corrupt or personal interest affecting the second transaction, it must therefore be looked upon as perfectly pure and free from every objection whatever.

How the case put by *Mr. Roupell* would be, viz. where a power had been exercised in such a manner, that it could not stand, and this being discovered by the person who had executed it, he had obtained the concurrence of all the parties interested in undoing the execution of that power, and in setting the matter quite free again, altogether level and fair, I express no opinion. Whether he could then proceed, fairly and properly, on a due consideration of the family interest, to execute the power exclusively in favour of some, even of the very same persons, to the exclusion of the one who had been excluded before, and no other, I do not think it necessary to
[*504] give any opinion. It *would seem very hard, if it could not be done: if an error of that sort could not be corrected. At the same time I should feel a very great difficulty, because it is almost

impossible for the parties to get into the same situation in which they were before.

Here in 1844 the father was embarrassed by what he had previously done in 1834, which he thought and intended it to be an execution of the power; he proceeded on that footing, and although he has used words which would have an operative effect, if that power had never been previously attempted to be exercised at all, yet his reference to the power was clearly as if it had previously been executed. I do not think that the deed of 1844 has the same operation as if the previous execution of the power were completely void and non-existing. If it had been authoritatively and properly declared, that the first execution of the power was entirely gone, for any thing I know to the contrary, the second execution of the power might not have been bad; but under the circumstances in which it was executed, tainted as it was with the first execution of the power, I cannot have any doubt, that it was not a complete and valid execution of the power for the exclusive benefit of the daughters.

I am of opinion that the demurrer must be overruled.

[At the hearing of this suit, reported in 17 Beav. 37, the Court was satisfied that the property conveyed to the daughters would have realised more than the amount of the fund appointed to them and that the appointment was therefore valid, and the bill was accordingly dismissed with costs.]

SHALLCROSS *v.* WRIGHT.

(12 Beav. 505—510.)

1850. *May* 6.

Rolls Court. Lord LANGDALE, M.R. [505]

A testator devised his real estates to A. and B., in trust to sell and pay off all incumbrances thereon, and stand possessed of the residue "as part of his personal estate." He bequeathed his personal estate to the same persons, in trust to convert, and with the produce thereof and of the sales of his real estates to pay his debts, &c., and the legacies, and to pay the residue to whom he should give the same by codicil. He made no gift of the residue: Held, first, that the incumbrances were payable out of the real estate; secondly, that the debts and legacies were payable *pari passu* out of the mixed fund, composed of the produce of realty and personalty; and, thirdly, that of the surplus, the part arising from realty belonged to the heir, and that from the personalty to the next of kin.

THE testator, by his will dated in 1836, gave and devised all his real estate to Wright and Bishop and their heirs, upon trust, as soon as conveniently might be, to sell, and by and with the said

SHALLCROSS v. WRIGHT.

purchase monies, to pay off all incumbrances affecting the said estates, and to stand possessed of the residue thereof, as part of his personal estate. The testator also bequeathed to Wright and Bishop all his household goods, &c. &c., and all other his personal estate and effects, upon trust, to convert the same into money, and by and with the produce thereof, and the said produce from the sales of his said real estate and the rents thereof until sale, to pay his debts, and funeral and testamentary expenses, and all costs, charges and expenses in carrying the trusts of his will into execution; and then, upon trust, to pay several legacies, and then to pay the residue of the said trust monies to whom he should give the same, by any memorandum to be on his said will indorsed.

The testator appointed Wright and Bishop his executors.

The testator made no disposition of the residue, and the question was to whom it belonged. The plaintiff, as the heir-at-law, claimed that portion of the residue which arose from the real estate.

[506] *Mr. Turner* and *Mr. Elderton*, for the heir:

* * The mixed fund must be divided rateably between the heir and next of kin: *Roberts* v. *Walker* (1). * * *

Mr. Walpole and *Mr. G. L. Russell*, for the next of kin.

Mr. Roupell and *Mr. Villiers*, for one of the executors.

Mr. Turner, in reply.

[508] THE MASTER OF THE ROLLS:

If a testator intends to dispose of his real and personal estate, and, for the purpose of the disposition contemplated, directs the whole of his real and personal estate to be converted into money and applied according to the directions he has given or contemplated, but some of the purposes he had in view fail, the question then arises, to whom the money belongs. Such questions are always attended with some difficulty, and the object is to decide according to some rational and recognised principle, so that the grounds on which the case is disposed of may be understood by the parties.

The first question which arises is, on what is called "the conversion out and out," an expression commonly used, and which ought to be clear enough, but is nevertheless sometimes attended

(1) 32 R. R. 318 (1 Russ. & My. 752).

with great difficulty. Here, a conversion is intended for some purposes, and to some extent, but to what purposes and what extent is made a great difficulty. There is a surplus consisting partly of real or the produce of real estate, and partly of personal estate, or its produce in the shape of money. One question is, whether as between the two classes of representatives, this was intended to be a conversion out and out. It is no answer, that there was an intention to convert into money, because it is settled, that where the conversion is for a purpose which fails, the produce will go to the heir or next of kin, according as it may have been produced from real or personal estate.

Here, in the first place, there is to be an actual conversion, for the devise is to trustees, upon trust, as soon as convenient to "dispose of all the said estates, and by and with the said purchase monies to pay off all *incumbrances affecting the said estates." [*509] The trustees therefore, having obtained the purchase money instead of the land, are to pay off all incumbrances; "and to stand possessed of the residue thereof as part of his personal estate." Clearly, therefore, there was a conversion into money, and next there was a clear, distinct, and express direction to apply the money in paying off the incumbrances. I think this direction imperative, and that the trustees were bound to apply this money in payment of the incumbrances affecting the estate.

Then comes a bequest of all his personal estate, "upon trust, to convert the same into money, and by and with the produce thereof, and of the produce of the sales of his real estate and rents &c., to pay his debts" &c. The question is, what is the nature of the particular fund, whether it is to be considered as a general and common fund made up of the produce of the real and personal estate, which is to be applied in common, in satisfaction of the funeral expenses and debts, or whether, notwithstanding the care the testator has taken to bring the constituent parts into one mass, it ought to be considered as subject to the general rule of law, by which the personal estate is the fund first applicable to the payment of debts, &c. I cannot so construe this will while the case of *Roberts* v. *Walker* and other existing cases depending on that principle, remain unreversed. I ought not in this place to reverse that which I consider to be at this time the rule of this Court.

The produce of the real estate ought, therefore, in the first place, to be applied in payment of the incumbrances: *the residue of the [*510]

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real and personal estate ought to be applied, *pro ratâ*, in satisfying the debts and funeral expenses &c., and of what remains, that portion derived from the real estate ought to go to the heir, and the portion arising from the personal estate belongs to the next of kin.

IN RE WILLIAMS.

1849.
Nov. 22.
Dec. 3.
1850.
May 23.

(12 Beav. 510—516; S. C. 19 L. J. Ch. 422; 14 Jur. 561.)

Upon an alleged misjoinder of husband and wife as petitioners, counsel, upon the instructions of the solicitor, undertook to amend by making it the petition of the wife by her next friend: Held, that the solicitor was not personally responsible for the performance of the undertaking.

Rolls Court.
Lord LANGDALE, M.R.

IN this case, a petition, presented by Mr. and Mrs. Nicholson,
[510] being called on to be heard, it was objected by one of several respondents, that the petition related to or affected the separate estate of Mrs. Nicholson, and ought to have been presented by her next friend, and not by her husband and herself jointly, and thereupon, it being observed, that the objection could not be determined without hearing the case, the counsel for the petitioners, instructed by their solicitor then present, undertook to amend the petition, if required by the Court, and the Registrar made a note to the effect, that the counsel for the petitioners undertook to amend the petition, if required by the Court, making it the petition of the wife by her next friend. In consequence of this undertaking, the objection was not further pressed; and after a very long hearing, an order was made for the delivery up to the petitioners of certain bills of costs, and of certain deeds, papers, and writings, and the costs of some of the respondents were ordered to be taxed and to be paid to them by the petitioner William Nicholson.

[511] At the time when the order was made, nothing was said about the undertaking to amend the petition if required, and no order was made in pursuance thereof; but on the attendance before the Registrar to settle the minutes, the petitioners were required to amend the petition, pursuant to the undertaking. The matter being afterwards mentioned to the Court, it was ordered, that the petition should be amended by making it the petition of the wife by her next friend, and further, it was ordered, that the delivery over of certain accounts by the respondent, Mr. Weir should be made conditional on his costs being first paid.

Various applications having been made to the solicitor for the petitioners, to amend the petition accordingly, he declined to do so,

In re WILLIAMS.

and thereupon a motion was made, that Mr. and Mrs. Nicholson might amend the petition in four days, or, in default thereof, that their solicitor might be ordered to perform the undertaking (stated to be his), or pay such costs of Mr. Weir, of the petition and consequent thereon.

Mr. R. Palmer, in support of the application. * * *

Mr. Beavan, contrà.

The motion stood over to give the solicitor an opportunity of making an affidavit.]

Dec. 3.

The solicitor made an affidavit, stating that he did not give any personal undertaking, but that it was given on behalf of the clients. The motion was again resumed. [512]

Mr. Beavan in opposition to the motion:

As to the clients, the order cannot be resisted; all that is asked, on their behalf, is a reasonable time to enable them to comply.

But with respect to the solicitor, there is no liability. It must be admitted, that where a solicitor personally undertakes, he is personally responsible, and that the Court will compel him to perform his individual undertaking, as where a solicitor personally undertakes to appear for his client, or to accept service of a writ, or to *pay the debt and costs or a sum of money for his client, &c. [*513] Such an undertaking must be, and must be expressed to be, his own personal undertaking.

But where undertakings are not expressed to be those of the solicitor personally, they are regarded, as they are in fact, those of the client alone. * * *

The party who now applies never took the objection at the hearing; the only person who objected was *Williams, who was [*514] declared not to be entitled to his costs. The objection then taken was not for the purpose of securing the costs, but to bind the *feme covert* by the decision of the Court; now, a substantial next friend is required from the solicitor, which, in effect, is asking that the solicitor may personally pay the costs.

Mr. R. Palmer, in reply:

* * The solicitor, in his affidavit, does not state that he had any authority to undertake for his clients: the necessary consequence is, that it must be assumed that he pledged his own responsibility.

* * * * *

In re WILLIAMS.

1850. *May* 23.

[515]

The MASTER OF THE ROLLS reserved judgment.

THE MASTER OF THE ROLLS:

The only question which is to be decided on this occasion is, whether the undertaking, which the solicitor of the petitioners instructed their counsel to make, is to be considered as the personal undertaking of the solicitor, for which he is personally answerable?

There can be no doubt, but that the petition was heard on the faith of the undertaking which he caused to be given, and that the failure of the undertaking gives just cause for great disappointment; but I have not been able to find any authority, in which it has been held, that a solicitor has been held personally answerable for all the consequences proceeding from the failure of such an undertaking as this, given under such circumstances. Having regard to the mode in which and the circumstances under which it was given, I have come to the conclusion, that it can only be considered as the undertaking of the client, and, consequently, that no order is to be made on such part of the motion as relates to the solicitor personally.

I do not think that the solicitor is entitled to the costs of this motion.

1850. *April* 27. *May* 23.

Rolls Court.

Lord LANGDALE, M.R.

[517]

PUGH *v.* VAUGHAN (1).

(12 Beav. 517—520.)

An equitable tenant for life being in possession of the estate, he and his lessee had committed waste and refused to permit the trustee to examine the condition of the land. The trustee having brought ejectment, the COURT, under the circumstances, refused to continue an injunction to restrain the action, even on the plaintiff undertaking to cut no more timber, and to permit the inspection.

UNDER the will of the testator, the legal estate in the property in question was vested in the defendant Edward Vaughan, on trust "to pay to the defendant John Vaughan the rents and profits thereof during his life," with remainder to Edward Vaughan and Charles Vaughan, as tenants in common in fee, with remainders over.

The case made by the plaintiff was this: that the tenant for life being in possession with the consent of the trustee of the estate, by indenture, dated in 1845, demised it to the plaintiff for ninety-nine

(1) *In re Hotchkys* (1886) 32 Ch. D. 408, 55 L. J. Ch. 546.

years, if he should so long live, and that the plaintiff entered into possession. That the trustee had lately commenced an action of ejectment against the plaintiff, to recover possession of the property.

The plaintiff charged, that John Vaughan and Edward Vaughan were acting in concert to eject the plaintiff before the determination of his tenancy, and by this bill, filed against the tenant for life and trustee, he prayed an injunction to restrain the action.

The plaintiff obtained the common injunction for want of answer, after which, the defendant, the trustee, put in his answer, stating, that the testator, by his will, provided that if the tenant for life should attempt to alien or charge his life interest, "or interrupt his trustees and executors in duly executing the trusts" of his will, his estate should go over to the person next *entitled: [*518] that on the death of the testator in 1841, he, the trustee, entered into possession: that afterwards, Anne Vaughan, the widow (since deceased, who was then entitled for life), and John Vaughan the present tenant for life, having, without the consent of the defendant, entered into possession, cut down and sold large portions of the timber growing on the said lands, and committed other acts of waste. That upon the decease of the widow, John Vaughan entered into possession, and the receipt of the rents of the said estate, but without the consent and against the wishes and remonstrances of the defendant. That the plaintiff had notice of the defendant's title. "That the estate had been greatly neglected, and that the plaintiff had cultivated and used the lands in the most improper and wasteful manner, and contrary to the course of husbandry adopted in the neighbourhood, and had felled timber growing thereon, and converted the same to his own use: had permitted the buildings on the said estate to fall into decay and ruin, and had altogether refused to permit the defendant to enter upon the said estate, in order to ascertain the actual state and condition thereof."

The defendant, Edward Vaughan, having put in this answer, obtained an order *nisi* to dissolve the injunction.

The plaintiff undertook to show cause; and the question now was, whether the order ought, upon the merits disclosed in the answer, to be made absolute.

Mr. R. Palmer and *Mr. C. Hall*, for the plaintiff, argued, that the plaintiff, being equitable tenant for life, was entitled to the management and possession of the property. They cited *Denton*

PUGH v. VAUGHAN.

v. *Denton* (1), in *which case, a testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees, upon trust to pay the rents to or permit the same to be received by one for life, with remainders over. On the testator's death, the tenant for life took possession of the estate and title deeds, and he kept down the annuities, but cut some timber. The trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds and to receive the rents. The COURT, by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases, or cut timber without the consent of the trustees, and bringing the deeds into Court. They offered to give a similar undertaking.

[*519]

They argued, that in this case, the trustee having acquiesced was bound by the lease, and that the proper remedy for the waste, if any, was by means of the covenant and power of re-entry contained in the lease, and that this was not such a question as ought to be disposed of before the hearing of the cause.

Mr. Turner and *Mr. Allnutt*, for the defendant, argued, that as the property had been abused, the trustee was justified in taking possession and seeing to the proper management of the property.

The MASTER OF THE ROLLS reserved his judgment.

May 23.

THE MASTER OF THE ROLLS:

The defendant, Edward Vaughan, having put in his answer, has obtained an order *nisi* to dissolve the injunction which was obtained for want of answer; and *the question now is, whether the order ought, upon the merits disclosed in the answer, to be made absolute.

[*520]

I strongly incline to think, that the testator must, from the directions contained in his will, be considered to have intended, that the trustees of his will should have the management of the devised property and the receipt of the rents; and that the defendant, Edward Vaughan, has some reason to complain, that the defendant John, and the plaintiff, as he says, acting with him, have endeavoured to manage the property independently of him.

(1) 7 Beav. 388, where the equitable tenant for life had been in possession for four years with the consent of the trustees, and there was no reason why that state of things should be disturbed before the hearing of the cause, the COURT restrained the trustees from proceeding with an action for ejectment in order to preserve matters *in statu quo* until the tenant for life could have his position determined in equity.—O. A. S.

But there can be no doubt that it is the duty of the trustee to protect the property against the improper acts of the tenant for life; and in this answer it is distinctly sworn, that before the life interest of the defendant John vested in possession, he, with Anne Vaughan, his mother, entered into possession, and while in possession, cut down and sold large portions of the timber growing on the lands, and committed other acts of waste. This was before November, 1843. But it is further sworn, that the plaintiff has felled timber growing on the land and converted the same to his own use, and has refused to permit the defendant to go on the land, to ascertain the actual state and condition thereof.

Upon this statement, I think that the defendant is entitled to have the injunction dissolved, and that, under the circumstances, I should not be justified in doing what I should have been glad to do, if the parties would consent,—continue the injunction, on the plaintiff undertaking to cut no more timber, and to permit the trustee to enter on the land, at all convenient times, to ascertain the state and condition thereof.

IN RE THE WINDSOR, STAINES, AND SOUTH WESTERN RAILWAY ACT.

1850. *May* 29.

Rolls Court. Lord LANGDALE, M.R.

(12 Beav. 522—524.)

As to what amounts to a "wilful refusal" within the Lands Clauses Consolidation Act.

[522]

IN October, 1847, Mr. Essex agreed to sell a portion of his land to the Windsor, Staines, and South Western Railway Company, for the purposes of their railway, and the Company were to pay the costs, charges and expenses, including the surveyor's charges. The Company were desirous of obtaining immediate possession; and it was agreed, that the purchase money should be deposited in the hands of a banker, until the conveyance should be executed. This was done, and possession was, in consequence, given on the 3rd of May, 1848. The Company afterwards agreed to grant to Essex a lease of the slopes from his land to the railway.

In March, 1849, the Company were ready to complete the purchase alone; but Essex insisted that the *two transactions [*523] should be settled simultaneously, and this seemed to have been acquiesced in. The lease was ready in March, 1850, and an appointment was made for completing. On the 22nd of March,

In re THE WINDSOR, STAINES, AND SOUTH WESTERN RAILWAY ACT.

1850, the Railway Company tendered the purchase money and interest, and offered to pay the vendor's solicitor's bill, which amounted to 155*l.* under protest, with 65*l.* for the charges of the vendor's surveyor, whose bill amounted to 227*l.* This the vendor's solicitor declined to receive. The Company, on the next day, tendered to the vendor, personally, the purchase money and interest, which, being refused, the amount was three days after paid into Court.

The vendor now presented a petition for the transfer of this sum, and the payment of the costs, charges, and expenses, and the only question was, whether there had been a "wilful refusal" to receive the money within the meaning of the 80th section of the Lands Clauses Consolidation Act (1).

The solicitor's bill was afterwards taxed, and 50*l.* 16*s.* 8*d.* was taken off.

Mr. R. Palmer and *Mr. Dean*, in support of the petition, cited *Ex parte Bradshaw* (2).

Mr. Turner and *Mr. Wickens*, *contrà*, argued that the agreement for the slopes was distinct from that for the purchase, and that therefore the vendor was not justified in refusing to complete the one without the other. That the bill of costs and surveyor's charges exceeded the amount really due, and that, therefore, the vendor, by refusing to complete unless they were paid, was guilty of a "wilful refusal" within the Act.

[534] THE MASTER OF THE ROLLS:

I cannot think that there has been any "wilful refusal" in this case. I must construe this Act strictly against the Company, and with reference to the right which they have obtained to interfere compulsorily with the private property of individuals. I conceive that it would be a "wilful refusal," if, without any reason, the vendor had refused to accept the purchase money, or if his objection had been merely capricious; but where there is a fair objection, a party is not to be treated as having wilfully refused, because the reason for his refusal happens afterwards to turn out untenable. In this I quite agree with the opinion expressed by the VICE-CHANCELLOR OF ENGLAND, in the case which has been cited to me.

If the party had by pressure compelled the payment of an improper bill, there would have been no difficulty in afterwards

(1) 8 Vict. c. 18.

(2) 80 R. R. 46 (16 Sim. 174).

obtaining a taxation; but here, though the charges have been reduced as against the Company, still it is not suggested that they were improper as against Mr. Essex.

I also think, that when the Company made the tender, it would have been right for them to give distinct notice, that they did so, for the purpose of justifying their paying the purchase money into Court and to relieve them from further costs. This they omitted to do.

The petitioner is entitled to her costs, charges and expenses, as usual.

SHALLCROSS *v.* WRIGHT.

1850.
May 3.

(12 Beav. 558—563; S. C. 19 L. J. Ch. 443; 14 Jur. 1037.)

Rolls Court
Lord LANGDALE, M.R.

The testator, while on a visit, died of a malignant fever. The furniture was, by the advice of the medical advisers, destroyed, and the friend was obliged to remove from his house: Held, that the testator's estate was liable for the damage and incidental expenses.

[558]

A physician attended the testator for many years, without having obtained any remuneration. He stated "that the testator had promised to pay him for his services, or leave him an equivalent." He did neither: Held, that the physician had no claim against the estate, and a payment made to him by the executor was disallowed.

THIS case came on upon exceptions to the Master's report.

By the decree, it was referred to the Master to take the usual accounts of the personal estate of Francis Brookes, the testator. The Master had disallowed the executor two sums of 160*l.* and 100*l.*, paid by him, under the following circumstances:

The testator, Francis Brookes, being in a very bad state of health, went to Leamington, in order to obtain further medical advice. At that place, Major Hawkes, who was on terms of intimacy with the testator, arranged, according to the desire of the testator, to receive *him into his house. The testator died there shortly afterwards of [*559]
a malignant fever, and the physician and medical attendants advised and urged the necessity of the immediate removal of Major Hawkes and his wife and family from the house, while being fumigated, cleansed, and whitewashed, and that the bed and furniture of the room in which he died should be destroyed and burnt, to prevent infection, stating, as a reason, that the deceased had died in a state of high and malignant typhus fever. The bed &c. were accordingly burnt, and Major Hawkes and his family removed to an hotel, and thereby incurred a considerable expense. The executor had allowed Major Hawkes the sum of 160*l.* for his expenses and the destruction of his property.

SHALLCROSS v. WRIGHT.

The Master, though he disallowed the executor this payment, reported, that the amount did not appear to him to be unreasonable; but that as he did not consider it to be strictly an expense legally payable by the executor, he had not allowed the same.

The executor took exceptions to this report, submitting that this sum ought to have been allowed him.

Mr. Roupell and *Mr. Villiers*, in support of the exceptions:

The resistance to the demand in this case, on the part of persons taking the estate of the testator, is extremely ungracious. There is in this case an implied contract, for the acts done were "such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform" (1). Major Hawkes, in the [*560] performance of an act of necessity and *humanity, has been exposed to a considerable loss, and justice would require that a proper compensation should be made for the damage which he has incurred. The principle of such an implied contract has been acted on in several cases. Thus in *Jenkins* v. *Tucker* (2), where a third person had, in the absence of the husband, voluntarily paid the funeral expenses of the wife, it was held, that he might afterwards recover the amount from the husband, as upon an implied contract. So in *Tugwell* v. *Heyman* (3) and *Rogers* v. *Price* (4), it was held, that an executor who has assets sufficient for that purpose, was liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person. Again, in the case of a lunatic, the law will raise an implied contract, and consider a person as having a valid demand or debt against the lunatic or his estate, for monies expended for the necessary protection of his person and estate: *Williams* v. *Wentworth* (5), *Nelson* v. *Duncombe* (6), *Wentworth* v. *Tubb* (7). In the last case (8), the costs of an unsuccessful traverse of an inquisition of lunacy were allowed out of the lunatic's estate.

Here the party was in a state of health, incapable of self-management, and a considerable public as well as private injury would have resulted from not taking the precautionary steps advised by his medical attendant. The testator being the cause of the damage, why should not he and his estate be liable for it? The money has

(1) 2 Bl. Comm. 443 (18th ed.).
(2) 1 H. Bl. 91.
(3) 13 R. R. 810 (3 Camp. 298).
(4) 32 R. R. 729 (3 Y. & J. 28).
(5) 59 R. R. 515 (5 Beav. 325).
(6) 73 R. R. 317 (9 Beav. 211).
(7) 57 R. R. 293 (1 Y. & C. C. C. 171).
(8) Reported 57 R. R. 293 (2 Y. & C. C. C. 537).

been, *bonâ fide*, paid by the executor, and the Master finds the amount reasonable.

Mr. Walpole and *Mr. G. L. Russell* for the next of kin, and [561]

Mr. Turner and *Mr. Elderton* for the plaintiff:

The testator was living at the house of Major Hawkes as a visitor, and the acts done were for the protection of himself and family, and not for that of the testator. This distinguishes this from all the cases cited. If the testator had lived, no action against him could have been maintained; if so, his estate is equally free from liability. The act, at the utmost, was a mere work of charity, which, even if the party were morally bound to perform it, still created no legal obligation. The executor, before making the payment, ought to have consulted the next of kin.

THE MASTER OF THE ROLLS:

Considering all the circumstances, I think that this was a case of necessity; for reasons of an important nature required that the dead body should be buried without delay, and if this had been done by a stranger, there would have been a sufficient consideration, from which a contract to pay would have been implied.

I cannot distinguish the cases. Here it was not only necessary to remove the dead body, but to destroy the bed furniture and other things which surrounded this gentleman, who, it appears from the evidence, died of a fever so highly contagious, that not only the safety of the persons in the house, but the protection of the neighbourhood, absolutely required that it should be done. There was, therefore, both a necessity to do it, in order to prevent the probable mischief, and there was also a duty on the persons surrounding this gentleman to perform it. There being both a necessity and a duty, why *is this gentleman not to have the [*562] benefit of an implied contract? The necessity and duty co-existing, I think that he is entitled to be reimbursed out of the estate of the testator.

The second exception arose under the following circumstances:

Dr. Knight, a physician, had been in the habit of attending the testator for many years, and, latterly, daily, but had received no remuneration for his services. After his death, the executor paid Dr. Knight 100*l.*, as a compensation for his professional services.

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This payment was also disallowed by the Master. Dr. Knight, in his affidavit, stated, amongst other things, that the testator "promised to pay him for his services, or leave him an equivalent."

The executor excepted to the Master's finding.

Mr. Roupell and *Mr. Villiers*, in support of the exception, argued, that a physician may, by actual contract, have a legal right of action for his fees, *Veitch* v. *Russell* (1), and that here there was such a contract, for the testator had promised either to pay him for his services or leave him an equivalent, and not having performed the latter alternative, both he and his estate were under an obligation to comply with the former and pay Dr. Knight for his services.

Mr. Turner and *Mr. Elderton, contrà*, argued, that a physician could not maintain an action for his fees, *Chorley* v. *Bolcot* (2); and that here no special contract was proved. That this being a case [*563] in which *the party had relied on a mere expectation, and had no legal demand, the executor could not justify the payment.

THE MASTER OF THE ROLLS:

I think that in this case, there is neither debt nor contract. This gentleman went on from year to year without claiming anything whatever, but, manifestly, with a view of receiving a legacy. Where is the contract? I cannot find any, and the claim cannot be allowed as a debt.

The executor, who has taken upon himself to pay this sum, stands in the situation of the person he has paid, and if there is no legal debt, the payment cannot be allowed him. I must overrule this exception.

1849. *Nov.* 14, 16, 19, 20, 21, 22, 23, 24. 1850. *Feb.* 9.

BLENKINSOPP *v.* BLENKINSOPP.

(12 Beav. 568—588; S. C. 19 L. J. Ch. 425; 14 Jur. 777; affd. 1 D. M. & G. 495; 21 L. J. Ch. 401; 16 Jur. 787.)

[AFFIRMED on appeal, as reported in 1 D. M. & G. 495.]

Rolls Court. Lord LANGDALE, M.R. [568]

(1) 3 Q. B. 928.

(2) 2 R. R. 395 (4 T. R. 317).

THORNBER *v.* SHEARD (1).

(12 Beav. 589—603.)

1850.
Jan. 28, 29, 30.
Feb. 25, 27, 28.
March 1.
May 24.

Rolls Court.
Lord LANGDALE, M.R.

[589]

About six months after a lady came of age, a creditor of her father obtained from her securities for his debt. The COURT was of opinion, that the creditor had not used any undue or fraudulent means, or availed himself of the fraud of any other party, to procure payment, and held, that the mere fact of a daughter voluntarily paying the debt of her father, who was in difficulties, was not, of itself, ground for imputing undue influence to the father, or, even if such influence had been exercised, for imputing knowledge of it to the creditor who received payment in that way.

An agreement to release executors entered into about three months after an infant came of age, and carried into effect about three months subsequently by deed, set aside; the agreement having been entered into in the absence of proper independent advice and assistance, and without a proper opportunity of examining the accounts, and the deed having been executed under the same influence, and without a proper and necessary examination and verification of the accounts.

THE following is a brief outline of this case, which is stated, in detail, in the judgment of the COURT.

The plaintiff Grace Thornber, and her sister Mrs. Thomas, were, under the will of their grandfather, entitled to an estate called Buttergate Sykes, and to his residuary estate. This estate had been the subject of litigation with their father, which was compromised in May, 1845, during the plaintiff's minority.

On the 2nd of January, 1847, Grace Thornber attained twenty-one; and afterwards, on the 10th of April, 1847, she applied to the executors of her grandfather's will for an account. She desired that it might be sent to her that she might peruse it at home. On the 13th of April, William Thomas (her brother-in-law) (acting as agent of the executors) took the original accounts without any copy to her, and he declined to give her the originals. At that meeting, she, in the absence of any professional assistance, came to an agreement to buy her sister's moiety of Buttergate Sykes; and she further agreed to execute a release to the executors of her grandfather.

They went together the same day to Mr. Edwards, a solicitor, who had never before acted for her; and the agreement was drawn up and signed; but he did not examine the accounts. [590]

This agreement was afterwards carried into effect by deeds executed on the 21st of July, 1847, and by a release to the executors, which were prepared by Edwards and executed by the plaintiff. The executors' accounts were produced to Mr. Edwards

(1) *Kempson* v. *Ashbee* (1874) L. R. 10 Ch. 15, 44 L. J. Ch. 195, 31 L. T. 525; *M'Mackin* v. *Hibernian Bank* [1905] 1 I. R. 296.

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for examination; but no receipts or vouchers were produced, or offered to be produced, though Mr. Thomas had them in his possession, ready to be shown if required. The COURT, on the whole, considered that the accounts were not examined and verified by Mr. Edwards satisfactorily, or in the manner, which, under the circumstances, they ought to have been, for the protection of the plaintiff. This was the first transaction complained of by the bill, and which it sought to set aside.

The second transaction was with respect to Sheard, and was as follows: The plaintiff Grace Thornber came of age, as already stated, on the 2nd of January, 1847. Some time before the defendant Sheard had lent her father, James Beaver, 300*l.*, for which the plaintiff had expressed her gratitude. Four days after coming of age she expressed her sense of the kindness of Sheard, and voluntarily promised to pay her father's debt. On the 24th of June, 1847, at the suggestion of the attorney acting for Sheard, she joined in a promissory note for the debt. Being pressed for further security, she, on the 5th of July, 1847, executed an equitable mortgage for the debt, which was prepared by Edwards. Afterwards, by one of the deeds executed by her on the 21st of July, 1847, the estate was conveyed to Sheard as a security for the debt.

[591] This bill sought to set aside both transactions, on the ground of fraud, collusion, undue influence and want of proper professional assistance in the transactions.

It prayed, that the agreements of the 13th of April and 5th of July, and the conveyance and release of the 21st of July, might be declared fraudulent as against the plaintiffs, and might be given up to be cancelled; and that it might be declared that the plaintiffs were not liable on the promissory note of the 24th of June; and that various consequential accounts might be taken; and that Mr. Edwards might pay the costs of the suit.

This case was argued by,

Mr. Roupell and *Mr. Elmsley*, for the plaintiffs;

Mr. Turner and *Mr. Greene*, for Sheard;

Mr. Thomas the younger in person;

Mr. C. P. Cooper and *Mr. Terrell*, for the executors;

Mr. Walpole and *Mr. Follett*, for Mr. Edwards;

Mr. Roupell, in reply.

[*Archer* v. *Hudson* (1), *Hylton* v. *Hylton* (2), *Walker* v. *Symonds* (3), *Attwood* v. *Small* (4), *Rhodes* v. *De Beauvoir* (5), and some Irish cases, were cited.]

The MASTER OF THE ROLLS reserved his judgment. [592]

THE MASTER OF THE ROLLS: *May* 24.

The plaintiff, Grace Thornber, is one of the two daughters of the defendant, James Beaver: the other daughter is the defendant Sally, the wife of the defendant, William Thomas the younger.

In the year 1830, Sally and Grace, then infants, became entitled (under the will of their uncle John Thomas), as tenants in common in fee, to an estate called Wadsworth Royd, and their father James Beaver took possession of that estate as their guardian, or on their behalf.

John Beaver, the grandfather of Sally and Grace, by his will dated on the 9th of July, 1838, devised an estate called Buttergate Sykes to his granddaughters, the daughters of James Beaver, as tenants in common in fee; and of this will he appointed the defendant, William Thomas the elder, sole executor. In August, 1839, the granddaughter Sally, still an infant, married the defendant, William Thomas the younger.

It appears that in July, 1842, a deed, purporting to be a deed of gift, made to James Beaver by John Beaver his father, was registered at Wakefield, and the real estate of the said John Beaver, including the estate devised by his will to his granddaughters, was thereby purported to be conveyed absolutely to his son James.

On the 10th of September, 1842, however, John Beaver, notwithstanding that alleged deed, executed a codicil to his will, and thereby confirmed the same in *all respects, but appointed the defendant, [*593]
George Taylor, an executor thereof, to act with the defendant, William Thomas the elder.

And in February, 1843, John Beaver duly executed a codicil to his will, and thereby declared, that no deed of any nature was ever signed or executed by him, or any person on his behalf, with his knowledge or consent, affecting the property disposed of by his will, and he therefore again confirmed his will.

(1) 64 R. R. 152 (7 Beav. 551).
(2) 2 Ves. Sen. 547.
(3) 19 R. R. 155 (3 Swanst. 1).
(4) 49 R. R. 115 (6 Cl. & Fin. p. 353).
(5) 36 R. R. 233 (6 Cl. & Fin. 532).

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A dispute respecting this alleged deed arose in the family, and some proceedings of a criminal nature took place in respect thereof, in the lifetime of John Beaver, and, as it is alleged, under his authority.

On the day appointed for the trial of these proceedings, proposals were made for an arrangement or compromise. No witnesses were produced, and the defendants were acquitted; but, on the same day, John Beaver, the testator, died (1), and the proposed compromise was at that time frustrated. The will of John Beaver was proved by his executors; but James Beaver still claimed to be entitled to the estates thereby purported to be devised under the alleged deed of July, 1842. It is unnecessary to state the particulars of the litigation which took place. Mr. Holroyd was the attorney of James Beaver; and it cannot be doubted but that there was great hostility. An action was brought by James Beaver to recover possession of the estate, and the defendant, William Thomas the younger, instituted a suit in equity against James Beaver, to which his daughter Grace was a party defendant. The action and suit
[*594] were at length compromised, and some degree of intimacy *between the members of the family was restored.

During the litigation, the defendant, Mr. Sheard, had been the friend of James Beaver, and had lent him a sum of 300*l.*, and the plaintiff, Grace, who at that time was under age and residing with her father, was fully aware of the fact, and expressed her gratitude to Sheard for his kindness. At first, no security was given for this loan, but in January, 1845, James Beaver agreed to mortgage his supposed or pretended interest in Buttergate Sykes to Sheard to secure the 300*l.* and interest; and also gave him a warrant of attorney to enter up judgment for the same purpose, and judgment was accordingly entered up in February, 1845.

Mr. Sheard continued to be on friendly terms with the family of James Beaver, during the minority of his daughter Grace, who, on various occasions, expressed her wish that the money lent by Mr. Sheard to her father should be secured to him. She attained her age of twenty-one years on the 2nd of January, 1847, and was then entitled, under her uncle's will, to an undivided moiety of Wadsworth Royd, and under the grandfather's will to an undivided moiety of Buttergate Sykes, and a moiety of his personal estate. In a day or two afterwards, namely, on the 6th of January, 1847, she expressed her sense of the kindness of Sheard. She and her

(1) 20th of March, 1843.

father were present at the office of the defendant, Mr. Edwards, a solicitor, and she stated, that she should soon be able to pay it, and that he should be paid if nobody else was. I do not find, that on this occasion any undue influence was employed, at least with the knowledge of Sheard, to prevail upon Grace to give these assurances. The subject was familiar to her, she was not in any way taken by surprise, and she *used the same or the like expression, not only in presence [*595] of her father, but also when he was not present; and it does not appear that she then gave or was asked to give any security for the payment.

In the month of February or March, 1847, the estate of Wadsworth Royd was sold. The price of Grace's moiety was 800*l.*, of which it seems that no more than 250*l.* reached her hands. But no complaint of that transaction is made.

On the 10th of April, 1847, she applied to the executors of her grandfather's will for an account; and it is a most unfortunate part of this case that her request was not complied with. She desired that the account might be sent to her, that she might peruse it at home; but on the 13th of April, her brother-in-law, the defendant, William Thomas the younger, took the original accounts, without any copy, to her, and on the same day entered into an agreement with her, which this bill seeks to set aside.

I must consider, that in taking the accounts to her, in consequence of the request she had made to the executors, William Thomas the younger was acting by their authority and as their agent: but acting for them he also acted for himself or in right of his wife, and took the same opportunity of coming to an agreement, which he expected would wind up the affairs of the testator, John Beaver. It seems to be extraordinary, that he should think it possible to settle affairs of considerable complication with a young woman, only three months after the attainment of her age of twenty-one years, and in the absence not only of any professional adviser, but of any friend, able or willing to afford her any independent or disinterested assistance. *The bill charges, that her father, James [*596] Beaver, colluded with William Thomas the younger in defrauding her. William Thomas, while he denies this, states, that James Beaver refused to take any part in the transaction, so that, according to his statement, she had no assistance: nothing but his own statements and suggestions. If he had properly considered his own duty, and what was necessary for his own safety in such circumstances, he would, even for his own sake, have refused to

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come to any agreement, without securing to her some protection: as it was, she had no explanation, except that which he gave. It is plain from the circumstances, that she wished to have the account left with her. He had with him the original account of the executors, but no copy thereof; and he, therefore, as he says, declined to give the original to her; and also, because he believed, that if he did so, she would take it to Mr. Holroyd, in whom he had no confidence; and he was apprehensive, that if the account got into Mr. Holroyd's hands, he, Mr. Thomas, would never see it again; under these circumstances, he alleged, as a reason for declining to part with the account, that she only wanted to take it to Mr. Holroyd, or to that effect. As Mr. Holroyd had been the solicitor of James Beaver and his daughter, in the Chancery suit which Mr. Thomas had prosecuted against them, and had their confidence, he was probably the most proper person to be consulted on such an occasion; and his exclusion, under such circumstances, and for such a frivolous and unsatisfactory reason, necessarily made it very difficult, if not impracticable, to come to any valid agreement with Miss Beaver.

Such a transaction without subsequent confirmation could hardly stand.

[597] However, he says, that they did come to an agreement; and as it was thought necessary to have a contract in proper form, Mr. Thomas offered to go to any solicitor except Mr. Holroyd, being apprehensive that he might involve the defendants in further litigation, and, as he says, for no other reason. Having therefore come to the agreement, they went together to Mr. Edwards, an attorney. Mr. Thomas told him what the agreement was. Mr. Edwards then stated the effect of it to Grace Beaver, who appeared to understand it. It was then reduced into writing, read over to both parties by Mr. Edwards, and then signed.

The agreement was to the effect: that William Thomas the younger should sell the interest of himself and his wife in Buttergate Sykes to Grace Beaver for 500*l.*, which she agreed to pay, on or before the 1st of June then next, and that on payment of the 500*l.*, the estate should be conveyed to her: that Grace Beaver should receive certain sums stated to be due to the estate of John Beaver deceased, and pay certain sums alleged to be due to the executors of John Beaver, and certain other sums alleged to be debts due from the estate of John Beaver; and further, that Thomas and wife, and Grace should, on request, execute a release to the executors of John Beaver.

It does not appear that she received any advice or assistance from Edwards, as to the prudence or propriety of signing this agreement; but the evidence is such as to show, that she understood the nature at least of what she was doing. She went, however, to Mr. Edwards, in the character of a person who had entered into and was bound by the agreement, and seems to have joined in giving the instructions for preparing it, under the influence, whatever it was, which had induced *her to enter into the agreement; and she afterwards, [*598] in May and June, 1847, made some payments to Mr. Thomas in pursuance of the agreement.

During these transactions, it does not appear that any further application was made by Sheard; but, Grace Beaver being known to have sold her share of Wadsworth Royd, Sheard seems to have thought, that the time was convenient to ask attention to his claim, and, at the instance of himself or his friend, Grace Beaver attended with her father at the office of Edwards, and on the 24th June, 1847, there met Susy Hodgson, the mother of Sheard, and, after some conversation, in which the plaintiff Grace admitted and repeated her promise to pay her father's debt to Sheard, Edwards asked her, whether she had any objection to join her father in a promissory note for the amount due? To which she immediately replied, that she had not, and she did soon after sign a note, which was also signed by her father, for the payment of 390*l.* and interest to Sheard. The obtaining of this note was much dwelt upon by the plaintiff, as showing fraud on the part of Sheard; but it does not appear to me that I ought so to consider it. The debt was indeed the debt of the father; but she well knew the circumstances under which it arose; payment by her had been contemplated by her before she became of age, and promised immediately afterwards. She had subsequently dealt largely with her property, but there was no pressure upon her or upon her father by Sheard. She is reminded of her promise, instantly recognises it, and, on the suggestion of the attorney then acting for Sheard, consented to give this note, and promised to pay a part of the debt the same evening. It might have been, and probably was, very imprudent in her to do so, as, with the small sum she obtained from Wadsworth Royd, and the agreement *she had entered into [*599] with William Thomas the younger, she was probably without the convenient means of performing the promise which she made. But I do not think that there is ground for imputing fraud to Edwards or to Sheard; nor does there appear to me to have been any fraud

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in obtaining the agreement of the 5th of July, 1847, which she was asked for, after she had failed in a payment of part which she had promised. By this agreement, after reciting that she was indebted to Sheard in 390*l.*, being the money secured by the note, she agreed to mortgage her half of Buttergate Sykes and her other real estate to Sheard in fee, subject to redemption on payment of the 390*l.* and interest at the rate of 4½ per cent., to which amount it was, at her desire, reduced from 5 per cent., the amount at first proposed.

The arrangement of the affairs of Grace Beaver, in the circumstances in which she was now placed, required professional assistance; she consulted with Mr. Edwards on the subject, and had several interviews with him between the 5th and the 21st day of July, 1847, when the deeds complained of by this bill were executed. There was the agreement of the 13th of April, whereby she had agreed to purchase half of Buttergate Sykes, to pay certain debts of her grandfather, and to release the executors; and the agreement of the 5th of July, whereby she had agreed to give a mortgage to Sheard for the payment of 390*l.* No adverse question seems to have been raised as to the settlement with and release to the executors; but the accounts were to be looked to, and as to the purchase and security, in which Mr. Thomas and Mr. Sheard were concerned, it occurred to Mr. Edwards, that a final arrangement might be made in various modes. One of the modes proposed was,

[*600] that Sheard should pay what remained due to Mr. Thomas *on the agreement of the 13th of April; that the entirety of Buttergate Sykes should be conveyed to Sheard, and that Sheard should thereupon agree to convey the entirety of Buttergate Sykes to Grace Beaver, on his receiving from her, in twelve months, the amount of his advances and debt.

It seems that Thomas suggested that the twelve months should be extended to two years, and that Grace required and obtained some time to consider the matter. Whether she obtained any other advice does not appear, but having taken time to consider, she ultimately agreed to adopt the mode of settlement which Edwards had proposed.

With this plan for raising and securing the money required, was combined a plan for considering and finally settling the accounts with Mr. Thomas and the executors. In respect to them, Mr. Edwards was consulted, and he examined them, and on the 21st of July, 1847, two several deeds were executed, by the first of which, Thomas the younger and his wife, and the plaintiff, then Grace

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Beaver, released the executors from all claims and demands against them in relation to the estate of John Beaver, except as therein mentioned; and by the second, Thomas and wife and Grace Beaver, for the consideration therein mentioned, conveyed to Sheard the Buttergate Sykes estate in fee; and by an agreement or undertaking, also dated the same 21st of July, 1847, Sheard agreed, that on receiving from Grace Beaver, within two years from the date thereof, 1,018*l.* and such costs as were therein stated, he would convey and assure to her all his right and interest in the estate.

This transaction having taken place in July, the plaintiffs intermarried in October, and the bill was filed *in December, 1847. It [*601] is alleged, that all the transactions stated were fraudulent, and that Mr. Edwards, the attorney employed in relation to them, colluded in and was party to the fraud; and it is therefore prayed, that the agreements of the 13th of April and of the 5th July, and the conveyance and release of the 21st of July may be declared to be fraudulent as against the plaintiffs, and may be given up to be cancelled; and that it may be declared, that the plaintiffs are not liable upon the promissory note of the 24th June; and that various accounts, consequential upon this relief, be taken, and that Mr. Edwards may be ordered, personally, to pay the costs of the suit.

The bill is, to a large extent, founded on the alleged undue influence of the father (the defendant, James Beaver) over the plaintiff Grace. He has not answered the bill, which has been taken *pro confesso* against him; but this cannot affect the other defendants, against whom the fact of any such influence is not proved; and, however unfortunate the case of the plaintiff is (and I think it very much so), she cannot have relief against those who are not proved to have done her any wrong. I have already stated my opinion, that the settlement of the 13th of April, taken by itself, could not stand without confirmation; and the question is, whether it is confirmed by the subsequent release of the 21st of July, 1847. The accounts were produced to Mr. Edwards; and he had an opportunity to examine them, if he had been instructed and had thought fit so to do; but she appears to me to have gone to Mr. Edwards, not only on the 13th of April, but also afterwards in July, under the same influence which had induced her to make the agreement, and in the persuasion that she was bound by it. She understood the writing prepared by Mr. Edwards, which she signed; but no examination took place of the *reasons or considerations on [*602]

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which it was founded. At the meeting of the 5th of July, and in the presence of Grace, the book of the executors' accounts was produced by William Thomas the younger, to Mr. Edwards, to be examined by him on her behalf; and Mr. Thomas gave such explanations as Mr. Edwards required. Mr. Edwards says, that the accounts were by him carefully examined, with the view of satisfying her as to their correctness; but nothing seems to have been said, or is remembered to have been said, respecting the outstanding estate of John Beaver, or the debts due from that estate; and no receipts or vouchers were produced, or offered to be produced, though Mr. Thomas seems to have had them in his possession, ready to be shown if required. I do not think that the accounts were examined satisfactorily, or in the manner which, under the circumstances, they ought to have been.

But thinking that Mr. Edwards did not examine and verify the accounts in the manner which, under the circumstances, was necessary, or would have been very useful for the protection of the plaintiff, I do not think myself entitled to conclude, that he combined with or knowingly assisted the other defendants, or any of them, in perpetrating a fraud upon her; nor do I see any reason to impute fraud to Sheard. James Beaver was clearly indebted to him,—I see no reason to think that the plaintiff Grace was not *bonâ fide* desirous that the debt should be paid,—I do not think that Sheard used any undue or fraudulent means, or availed himself of the fraud of any other party, to procure payment, and I do not think, that the mere fact of a daughter voluntarily paying the debt of her father, who was in difficulties, is, of itself, ground for imputing undue influence to the father, or, even if such influence had been [*603] *exercised, for imputing knowledge of it to the creditor who receives payment in that way.

The arrangement was finally made by Mr. Edwards, as, I think, without fraud on his part, or on the part of Sheard; and I am therefore of opinion, that the conveyance to Sheard cannot be set aside as fraudulent. But it was intended to be conditional, and I think that it ought to stand as security only for what was clearly and *bonâ fide* paid by Sheard on the faith of it, as to which there must be an enquiry.

On the whole, I am of opinion, that the plaintiffs are not bound by the agreement of the 13th of April, 1847, for the settlement of the account with the executors, and to give them a release, or by the deed or release of the 21st of July, 1847; and, that the release

ought to be delivered up to be cancelled; and that the usual accounts must be taken of the estate of the testator, John Beaver, possessed or received by his executors and trustees.

And that an account must be taken of the several sums of money *bonâ fide* paid by Sheard, in consideration of the conveyance to him, and that the conveyance is to stand as a security for the amount which shall be found to have been so *bonâ fide* paid and advanced.

I do not know whether it is desired, or would be of any possible benefit to any party, to enquire into the consideration agreed to be paid by Grace for the share of her sister in Buttergate Sykes, and I do not therefore propose to give any directions about it, unless some further reason be given for it, which I shall leave the parties at liberty to do.

CLOVES *v.* AWDRY (1).

1850.
May 28.

(12 Beav. 604—606.)

Rolls Court.
Lord LANGDALE, M.R.
[604]

A power to appoint amongst children is not within the 27th section of the Wills Act, and a mere general devise or bequest to a child will not operate as an execution of such a power.

UNDER a will dated in 1809, Henry H. Mogg had a power of appointing by deed or will the sum of 500*l.* amongst all and every, or such one or more exclusively of the others or other of his children as he should direct. That sum was given, in default of appointment, between the children equally.

There were three children, William H. Mogg, and two others.

By his will, dated in 1849, after giving some pecuniary legacies, Henry H. Mogg bequeathed as follows:

"I give, devise and bequeath all my freehold and other messuages," &c., &c., "and all my household goods" &c., &c., "and all other my real and personal estate and effects, whatsoever and wheresoever, or of what nature or kind soever, and whether in possession, reversion, remainder or expectancy, (subject nevertheless to the payment of all my just debts, funeral and testamentary expenses, and the expenses of proving my will, and the legacies hereby bequeathed), unto my son Henry H. Mogg, his heirs, executors, administrators and assigns for ever, according to the nature and quality of the same estate and effects respectively."

(1) *In re Esther Williams* (1889) 42 Ch. D. 93, 58 L. J. Ch. 451, 61 L. T. 58.

CLOVES v. AWDRY.

After the testator's death a question arose, whether this will operated as an execution of the power.

[605] By the 27th section of the Will Act it is provided, as follows: "And in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Mr. Chambers, on behalf of William H. Mogg, argued, that under this section, the will operated as an appointment of the 500*l.*, a contrary intention not appearing upon the will: *Elliott* v. *Elliott* (1).

Mr. Faber, contrà, on behalf of parties representing the other children:

The 500*l.* does not pass by the will: first, because the power itself is not one of the nature contemplated by the Wills Act: it is not a general but a restricted power, giving merely a right of selection amongst a limited class of objects.

Secondly. The testator's debts &c. are directed to be first paid, and the testator having no power of charging them on this fund, cannot be assumed to have intended to dispose of it by way of residue; *Clogstoun* v. *Walcott* (2).

Mr. Chambers, in reply.

[606] THE MASTER OF THE ROLLS:

If this had been a power to "appoint in any manner he might think proper," I should have had no doubt whatever; but I think it is not. It is a power to appoint amongst his children in such manner as he thinks proper, and is of quite a different nature.

I do not think that this power comes within the provision of the Act of Parliament, and I cannot, therefore, say that it has been executed by this will.

(1) 74 R. R. 88 (15 Sim. 321). (2) 60 R. R. 396 (13 Sim. 523).

M'CALMONT *v.* RANKIN.

(8 Hare, 1—25; S. C. 19 L. J. Ch. 215; 14 Jur. 475.)

[AFFIRMED on appeal, as reported in 2 D. M. & G. 403.]

1849.
Feb. 14, 15, 16.
May 23.
June 5, 6.
Dec. 21.
1850.
Jan. 12, 14, 16, 21, 30.

WIGRAM, V.-C.
[1]

ATTORNEY-GENERAL *v.* LAWES.

(8 Hare, 32—44; S. C. 19 L. J. Ch. 300; 14 Jur. 77.)

1849.
Nov. 17, 19, 20.

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[32]

A direction by will to pay into a certain Bank "a yearly sum of 100*l.* for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward by the late Edward Irving, who may be persecuted, aggrieved, or in poverty, for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street:" Held, to be a valid charitable bequest of a perpetual annuity.

It is not necessary to constitute a good charitable bequest, that the objects to be benefited must be shown to be of necessity a permanent and enduring class, for, if the objects should fail, the Court may administer the charity *cy près*.

Where a legacy has been severed from the general estate, and becomes the subject of a suit, by the result of which the estate will not be affected, the costs of the suit are borne by the fund constituting the legacy, but the appropriation or investment by the executor of a particular sum to answer the legacy, where the question which arises upon it is a question between the general estate and the legacy, does not relieve the general estate from the costs of the suit (1).

AN information, at the relation of Christopher Heath and six others, to establish, as charitable, a bequest, made by the will of Ann Burrell, dated in September, 1836, which was in the following words:

"I direct my executors to pay unto Messrs. Drummonds, bankers, 49, Charing Cross, a clear yearly sum of 100*l.*, for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street."

The testatrix died in 1845. The defendant was her residuary legatee and administratrix with the will annexed. The defendant, out of the personal estate purchased and appropriated 3,333*l.* 6*s.* 8*d.* Consols, to answer the annuity, and by deed-poll declared the trusts of such sum to be for the purposes in the will mentioned, "so far as the same purposes are legally valid and capable of taking effect,

(1) *Fraser* v. *Murdoch* (1881) 6 App. Ca. 855, 45 L. T. 417; *In re Towry's Settled Estates* (1889) 41 Ch. D. at p. 87.

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under the said will, but not further or otherwise." And by her answer the defendant submitted to the Court, whether the annuity was well and effectually given to any charitable purposes, and whether the annuity was perpetual.

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Messrs. Drummond had declined to undertake the distribution; they were not parties to the suit.

At the hearing, a reference was directed, to inquire what were the doctrines referred to in the will; and whether there were or was any and what persons or class of persons answering the description of ministers and members of the churches there referred to, persecuted, aggrieved, or in poverty for preaching or upholding those doctrines; and what was the church referred to in Newman Street. The Master was also to inquire whether the persons named in the will had refused to act as trustees of the annuity.

The Master found, that Edward Irving was formerly the minister of a church in Regent Square, St. Pancras, in connexion with the Established Church of Scotland, and that, in or about 1832, he ceased to be such minister, and his connection with the Established Church of Scotland was dissolved by the act of that Church or the authorities thereof; but he thenceforth continued to be the minister, having a pastoral care over a majority of the persons theretofore communicants of the church in Regent Square, who withdrew upon his ejection, and became under him a separate congregation or religious society, which had ever since continued, and still continued to exist; and there were then divers congregations and ministers belonging to such religious society established in London and elsewhere in the United Kingdom, all of which held and professed certain lawful doctrines and tenets, called apostolical, which were taught and prominently brought forward by the said Edward Irving during his life, and which were described and referred to as such in the said will, as originally taught by the said Edward Irving; and the Master found, that the doctrines referred to in the

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will as "the apostolical doctrines *brought forward originally by the late Edward Irving," were the doctrine of the permanence of the gifts of apostles, prophets, evangelists, and pastors in the Church, the doctrine of the right of the Church to the continuance of the miraculous powers and gifts of the Holy Ghost given on the day of Pentecost, and the doctrine of the necessity of the presence of this fourfold ministry (including that of apostles), and of those powers and gifts in the Church, for the purpose of preparing and perfecting the Church for the second advent of the Lord Jesus Christ; all which doctrines were taught

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and insisted upon by the said Edward Irving, and were founded upon the doctrine of the true humanity, as well as divinity of the Lord Jesus Christ; and the same doctrines became and were the basis of communion by which the ministers and religious congregations adhering to the said Edward Irving, and to the doctrines taught by him after his separation from the Established Church of Scotland, were and had ever since been distinguished from other denominations or communities of Christians in this country. And the Master found, that, since the separation of the said Edward Irving from the Established Church of Scotland, numerous churches, to the number of thirty-five or thereabouts in the whole, had been from time to time formed in different parts of England, upon the basis of the said doctrines so taught by the said Edward Irving; and the worship and discipline of such churches had been and was conducted and administered by certain ministers who were known among the members of such congregations by the title of apostles, assisted by certain other ministers of various orders, who were known among the members of such congregations by the several titles of prophets, evangelists, and pastors; and the total number of the communicants of such churches, besides those regularly attending the worship of such churches, was then very considerable, and not *less than 4,000 persons; and that the number of the [*35] ministers of such churches was upwards of 270. And the Master found, that such churches were in process of formation at the date of the said will; and that the testatrix had full knowledge of the doctrines taught and maintained in such churches, and particularly of the doctrines taught and maintained by the said Edward Irving in the church in Newman Street; and the testatrix herself adhered to such doctrines, though she did not attend the public worship held in any of such churches. And the Master found, that many of the persons who were then ministers and members respectively of such churches were, before they embraced such doctrines, ministers or members of the Church of England, or of other religious denominations; and divers of such persons, before embracing the doctrines aforesaid, were deriving a liberal or competent maintenance from preferments, salaried offices, or other employments as clergymen, dissenting ministers, or schoolmasters, and otherwise, in the Church of England or in other religious denominations, and were deprived of such maintenance upon their embracing and professing the doctrines aforesaid, and, in consequence of preaching or upholding the same, were thereby reduced to a state of pecuniary distress and

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The Master stated, that he was of opinion and found, that there was such class of persons as thereinbefore mentioned, answering the description contained in the will. But that no evidence had been laid before him to show what persons there were answering the said description; and he found that the church in Newman Street, thereinbefore mentioned, was the church described in the will.

The Master also found, that Messrs. Drummond had refused to act as trustees of the annuity.

[*39] The *Solicitor-General, Mr. Roundell Palmer*, and *Mr. *Toller*, for the information, submitted, that the gift of the annuity constituted a good charitable bequest: *Mitford* v. *Reynolds* (1), *Nightingale* v. *Goulburn* (2); that the annuity was perpetual; and that the Court, without a scheme, might direct it to be paid to the account of the three ministers, at Messrs. Drummond's, to be applied by the seven relators, for the use of the class of persons indicated: *Powell* v. *The Attorney-General* (3), *The Attorney-General* v. *Comber* (4).

Mr. Kenyon Parker and *Mr. Bovill*, for the defendant:

First, the bequest is not charitable, within the meaning attributed to the word in this Court. It does nothing more than indicate a benevolent object, not necessarily charitable: *Williams* v. *Kershaw* (5), *James* v. *Allen* (6), *Morice* v. *Bishop of Durham* (7). Secondly, If the bequest be construed to import an object necessarily charitable, it is of the nature of a private charity, of which the Court will not take upon itself the administration: *Ommanney* v. *Butcher* (8). It amounts, on the most favourable construction, to nothing more than a gift to individuals in a certain situation; and upon that construction, if such individuals can be found to exist, and to answer the description, those persons may take an annuity for their lives: *Blewitt* v. *Roberts* (9). But such a construction does not involve any permanent endowment, to be established by a decree in this suit (10). The report does not even show that any particular persons are entitled to take under the gift, although it may be taken as showing that there are classes of

(1) 65 R. R. 372 (1 Ph. 185).
(2) 71 R. R. 196 (5 Hare, 484).
(3) 17 R. R. 8 (3 Mer. 48).
(4) 25 R. R. 163 (2 Sim. & St. 93).
(5) 42 R. R. 269 (1 Keen, 232, *n.*; 5 L. J. N. S. Ch. 84).
(6) 17 R. R. 4 (3 Mer. 17).
(7) 7 R. R. 232 (9 Ves. 399).
(8) 24 R. R. 42 (T. & R. 260).
(9) 54 R. R. 291 (Cr. & Ph. 274).
(10) See *Liley* v. *Hey*, 58 R. R. 204 (1 Hare, 580).

persons in the position of those whom the testatrix desired to relieve. [They also cited *Corbyn* v. *French* (1); *Ellis* v. *Selby* (2).]

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On the question of costs, they submitted that the administratrix, having set apart and appropriated the stock to answer the annuity, it had been thereby distinctly severed from the general estate, and that the costs should therefore be borne by the specific fund. The circumstance, that the defendant was the residuary legatee, was a mere accident. It must be taken as if the defendant had been the executor, who had paid over the residuary estate, and made himself a trustee of the particular fund, subject to the direction of the Court, or as if the executor had paid the fund into Court, under the Trusts Act, 10 & 11 Vict. c. 96.

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The *Solicitor-General*, in reply:

There is nothing in the bequest restrictive of the benefit of the gift to persons who were members of the particular churches then formed. It extends, upon a fair construction, to all who shall be ministers or members of the like churches thereafter to be formed. It is not limited, therefore, to persons then in being. That the objects of the charity may at some future time fail, is nothing more than may be said of any gift for charitable purposes. The fallacy of the argument on the alternative expression, is in treating it as though the testatrix had said she gave the *whole or half of the annuity, which would have made the gift uncertain; the true meaning is, that, having given the whole to the trustees or administrators of the bounty, and specified its object, she extends their power and the scope of their operations, by enabling them, at their discretion, to apply half of it within a narrower limit. The gift to the church in Newman Street is of itself a good charitable gift: *Attorney-General* v. *Cock* (3); and it cannot, therefore, impair the character of the general gift.

[*41]

The VICE-CHANCELLOR at the close of the argument said, that the bequest was not the less a charitable bequest, from the fact that it was given for the benefit of a limited class of persons; that it was not the number of the objects which made the distinction between a public and a private charity; that it was not the less a charity, because it was confined to those members of a particular class of persons who were subject to certain grievances, and not to the class at large; and that the bequest, being once declared valid as a

(1) 4 R. R. 254 (4 Ves. 418).
(2) 43 R. R. 188 (1 My. & Cr. 286).
(3) 2 Ves. Sen. 273.

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charitable bequest, the Court would not permit it afterwards to drop for want of objects, but would administer the fund *cy près*.

Nov. 20.

THE VICE-CHANCELLOR:

The only doubt, or rather the only uncertainty, that crossed my mind in this case, arose out of the second alternative, the power to give one half the legacy to the church in Newman Street. I am satisfied, however, that that does not make any difference. If the gift had been confined to the first alternative, that is, to the minister or members of the churches then forming, in consequence of the events

[*42] mentioned in the will, I *should have had no doubt that it was a charitable bequest to a general charitable use. It clearly would have extended to all ministers and members who should thereafter adhere to a congregation, the nucleus of which had been forming, or, at least, the formation of which had been commenced prior to the date of the will. It would have taken in all whenever they came; and I think it would also have taken in any churches or congregations of which it could be fairly said that they were formed after that date, on the occasion and in consequence of the ejection of Mr. Irving from the Church of Scotland. The testatrix clearly did not mean to speak merely of the particular congregations which she knew to be in a course of formation, but to speak generally of those congregations which should be formed on that occasion and under those circumstances. I am satisfied that that would have been a general bequest, coupling with it the gift for the church in Newman Street. I am not indeed satisfied that the latter bequest may not be a general bequest to a charitable purpose also. But, taking the whole bequest, I am clear that it must be considered a charitable bequest. The question then would be, whether the gift is not to be sustained because there is a power given to some one to appropriate half of the property (it could only go to the extent of one half) in that particular way. If it had been a general power, and the purpose to which it was to be applied was not charitable, then the whole, to some extent, would fall within the class of cases cited, of which the case at the Rolls is a strong instance. That case lays down the principle very clearly. In this case, however, there is a gift in the first instance to a purpose which I think is a good general charitable purpose; and I cannot think that the subsequent enumeration of a particular charity takes away from the gift that character of a general charitable bequest.

[43] In point of form, the question which has been argued is perhaps

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not open. The bequest to the church in Newman Street would not, I think, be a bad bequest standing alone; and with regard to the other, the Master has found, and there is no exception to his report, that there are objects who may take under it. I do not see how the question can be raised; but, whether there be this difficulty in form or not, I am of opinion that the bequest is one which must be supported.

With regard to the costs of the suit, I am very anxious not even to appear to deviate from a well-settled rule—that, where a legacy has been severed from the bulk of an estate, and becomes the subject of litigation, that particular fund, and not the general estate, is to bear the costs. I take the meaning of the rule to be this: that, if the executors, admitting the legacy to be payable, sever it from the estate, and a dispute afterwards arises between the persons to whom, or some of whom, the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs; but if the dispute arises between the persons claiming the legacy and those claiming the estate or the residue, whether the legacy is payable or not, that cannot be the case of a severance in the sense in which the rule I have referred to applies, because there, until the Court makes its decree that the legacy is payable, the legacy is not severed from the estate: the executors have kept it under their control for the purpose of having the point decided. If I were here administering the general estate, which, but for the admission of assets I should have been, I should have ordered the costs to be paid out of the estate. Instead of requiring to have the account taken, the executor in this case, who is also residuary legatee, admits assets sufficient to pay the legacy in question. The admission of *assets to pay the legacy is an admission of a fund sufficient to pay [*44] the costs of the suit, if the costs are properly payable out of the estate. I must, I think, regard this simply as a contest between the legatee and the estate itself, whether the legacy is to come out of the estate or not. The mere fact that the particular amount has been paid into a particular Bank, or placed in certain custody until the decision is known, cannot *per se* take the case out of the ordinary rule. The costs must be paid out of the estate, and it must be referred to the Master to settle a scheme.

1849.
Nov. 18, 20.

WIGRAM, V.-C.

[44]

MAINWARING *v.* BEEVOR (1).

(8 Hare, 44—51 ; S. C. 19 L. J. Ch. 396 ; 14 Jur. 58.)

A residuary gift to trustees, with a direction to apply such part of the interest as they might deem necessary in the maintenance of all and every the testator's grandchildren, the children of the testator's two sons, until they severally attained the age of twenty-one, and to accumulate the surplus, and when and as each of such grandchildren should attain the age of twenty-one years, to pay to each of them 2,000*l.*, and when and so soon as all and every his said grandchildren should have attained their ages of twenty-one, to pay and divide the trust-fund unto and amongst all and every his said grandchildren : Held, to be a gift for the benefit of all the children of the testator's two sons, born or to be born,—not confined to children living at the death of the testator, and not distributable upon the youngest grandchild for the time being attaining twenty-one; but that, on attaining twenty-one, the grandchildren were entitled to the interest on their presumptive shares, until another grandchild should be born.

WILLIAM CARVER by his will, dated in 1835, after bequeathing to his trustees all his shares and monies standing in his name in divers stocks, funds, and securities, and after declaring trusts of three several sums of 30,000*l.* Consols, for the benefit of his widow and sons, William James Carver and James Carver, for their respective lives, with remainder to the children of his said two sons, or their issue, declared that, as to the residue of his Consols, his 3*l.* per cent. Reduced Stock, his New 3½*l.* per Cent., and his Bank stock, and all other the stocks and funds or securities which might be standing in his name at his decease, (except the said three sums of 30,000*l.* Consols,) his trustees should stand possessed of such residue, upon
[*45] trust (after paying an *annuity of 20*l.* to Mary Scott for her life), to pay and apply such part and proportion of the dividends, interest, and annual produce of the residue, as the said trustees or the survivors or survivor of them might in their or his discretion deem necessary, for or towards the maintenance and education of all and every of his grandchildren, the children of his said two sons, William James Carver and James Carver, until they should severally attain the age of twenty-one years. And the testator directed, that the surplus of such dividends, interest, and annual produce, which should not be wanted and applied for the purpose last aforesaid, should be invested by his trustees in Government securities (with power to vary and transpose the same,) and proceeded : "And when and as each of my said grandchildren shall attain the age of twenty-one years, upon trust that they my said trustees, &c., do and shall, by the sale of such part of the stocks, funds, and securities then

(1) *In re Holford* [1894] 3 Ch. 30, 63 L. J. Ch. 637, 70 L. T. 777, C.A.

standing in their names or name, as may be necessary for the purpose, raise and pay to each of my said grandchildren so attaining the age of twenty-one years as aforesaid, the sum of 2,000*l.* for their own benefit. And I do hereby declare, that when and so soon as all and every my said grandchildren shall have attained their age of twenty-one years, they my said trustees, &c., do and shall stand possessed of the whole of the stocks, funds, and securities then standing in their names, upon any of the trusts of this my will, (over and above the three several sums of 30,000*l.* 3*l.* per cent. Consols, hereinbefore by me disposed of,) upon trust to pay, transfer, divide, and make over the same respectively, and the dividends, interest, and annual produce thereof, unto, between, and amongst all and every my said grandchildren, to and for their own absolute use and benefit as tenants in common, and not as joint tenants. Provided always, and I do hereby declare, that if I shall have only one *grandchild who shall live to attain the age of [*46] twenty-one years, then such one grandchild, upon his attaining that age, shall have and be entitled to the whole of the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, to which my grandchildren, if more than one should have attained the age of twenty-one years, would have become entitled. And I do hereby further declare, that each of my grandchildren, upon their severally attaining the age of twenty-one years, shall take vested interests under this my will. Provided also, and I do hereby further declare, that in case any or either of my grandchildren shall at any time during his, her, or their minority, go or be taken beyond the seas, for the purpose of being or to be educated in any foreign country, or for any purpose whatever, and shall remain beyond the seas or in any foreign country, for any purpose whatever, more than three calendar months in any one year, then and in every such case, and from thenceforth, the claim, right, and title of each and every such grandchildren so going or being taken beyond the seas to maintenance and education out of or in respect of any monies or property to which they, he, or she may be entitled under this my will, shall cease and determine and become forfeited; but so, nevertheless, that such forfeiture shall not in any respect affect the right of such grandchild or grandchildren to the principal of such monies and property, upon his, her, or their attaining the age or ages hereinbefore mentioned for payment of the same."

The testator died in 1837, leaving his two sons surviving. William James, one of the sons, had five children living at the

MAINWARING v. BEEVOR. [*47]

testator's death. James, the other son, was unmarried. The youngest of the five grandchildren attained twenty-one years of age in 1848, and no others had been born. The grandchildren then filed their bill *for the execution of the trusts of the residue of the stocks, funds, and securities, and for a declaration that they were entitled to an immediate transfer of their respective shares. Mary Scott the annuitant was dead, but the sons, William James and James, were still living.

The *Solicitor-General* and *Mr. Prior*, for the plaintiffs, submitted, that the objects of the bequest, (the grandchildren of the testator, the children of his two sons,) must be construed as grandchildren living at the death of the testator; or, if it went further, that it must be confined to grandchildren living at the death of the testator, and those born subsequently but before the youngest for the time being attained twenty-one. [They cited *Elliott* v. *Elliott* (1), *Hughes* v. *Hughes* (2), and other authorities.]

[48] THE VICE-CHANCELLOR:

In the case of a gift to children when they attain twenty-one, the reason of the rule of the Court is, that the eldest child, on attaining twenty-one, has a right to demand his share, and that this right is inconsistent with a gift to "all the children," including those who may afterwards be born of the parent named. In this case there is no such inconsistency. Here there is no express direction, conferring upon the grandchildren the right now to receive their shares, and no inconsistency would arise from holding all the grandchildren born in the lifetime of either of the parents named in the will, entitled to participate. If the class is to be confined to the grandchildren *in esse* at the death of the testator, the argument is intelligible. In the case of *Elliott* v. *Elliott*, the VICE-CHANCELLOR seems to have adopted that construction, on the ground that it brought the bequest within the rules of law as to remoteness, proceeding, I suppose, on the principle, that where a will admits of two constructions, that is to be preferred which will render it valid. The rules of construction cannot, however, be strained to bring a devise or bequest within the rules of law. If the class cannot be so restricted in this case, and grandchildren born after the death of the testator are to be admitted, there does not appear to be any reason for excluding a grandchild, born or to be born in the lifetime of either of the testator's sons.

(1) 56 R. R. 60 (12 Sim. 276). (2) 3 Br. C. C. 434.

Mr. Wood and *Mr. Edward Cooke*, for the trustees, submitted, that as James, one of the sons, had no child at the date of the will, or at the death of the testator, and still had no child, no rule of construction could exclude any child or children that James might hereafter have from the benefit of the gift. The interests of the surviving grandchildren in their presumptive shares being vested, they might now be entitled to the interest on such shares: *Scott* v. *Earl of Scarborough* (1), and the cases there cited.

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THE VICE-CHANCELLOR: *Nov.* 20.

Where a testator has given two inconsistent directions, and has said, that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attains twenty-one, in that case you must do one of two things,—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The COURT has in such cases decided in favour of the eldest child taking at twenty-one, as the will directs, and sacrificed the intention that all the children shall take. In this case, the testator has given the residue to all the children of his two sons, when the youngest attains the age of twenty-one years. There are a certain number of children, and the elder children attain twenty-one. The inconvenience pointed out by *Mr. Prior* then arises: the provision for the maintenance of those children ceases, though, as it cannot be certainly said that the youngest child has attained twenty-one, they cannot claim a distributive share of the fund. The question is, how long is the eldest child or the other children to wait. If the objects of the testator's bounty can be confined *to children of his [*50] sons living at his death,—which, independently of the fact that there is one son who had no children at that time, I am clear cannot be done in this case,—it might be possible to get at the conclusion which I have already mentioned, that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it be once admitted that a child born after the death of the testator may take, all the inconvenience is let in, and the eldest child may have to wait for an indefinite time, so long as children may continue to be born. How in that case is it possible to limit the class entitled in the way suggested, which is, that the moment the youngest child *in esse* attains twenty-one, there is to be a

(1) 49 R. R. 317 (1 Beav. 154).

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division, although there may be an unlimited number of children born afterwards? I do not see how the inconvenience pointed out can be avoided. The words of the will do not require an immediate distribution.

With respect to the case of *Hughes* v. *Hughes*, it appeared to me at first, that though the language of the COURT in giving judgment was in favour of the view I take of the case, the decree as drawn up was different. It is not, however, different, for it lets in all the children,—whether it means children *in esse* or children at any time born of the daughter, I do not know. It is not now the practice of the Court to make a prospective decree; but the decree is open to the construction, that every child of the daughter shall take a distributive share. I see no principle upon which a distribution can be demanded in the case before me, merely because the youngest grandchild *in esse* has attained twenty-one.

Declare, that, according to the true construction of the will of William Carver, the testator in the pleadings named, dated the 18th day of March, 1835, the plaintiffs, as representing the existing
[*51] *children of William James Carver, are not entitled to a division of the trust fund in the pleadings mentioned, in exclusion of any other children which may hereafter be born of either William James Carver or James Carver, but until some such other child shall be born, they are entitled to the income of such trust fund; and that the said plaintiffs will be entitled to the principal thereof, if no other such child shall be born and attain the age of twenty-one years.

1848.
June 5, 6, 7, 8, 9, 26.
1850.
Feb. 18, 20.

WIGRAM, V.-C.

On Appeal.
1851.
April 29, 30.
May 2.
1852.
Feb. 26.

Lord TRURO, L.C.

[51]

MONRO *v.* TAYLOR.

(8 Hare, 51—71; affirmed, 3 Mac. & G. 713—725; 21 L. J. Ch. 525.)

A purchaser of lands under the description of "partly freehold and partly leasehold," is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of title, or shown to be capable of being so defined; but the circumstance that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance.

The uncertainty in the boundary or extent of property, which arises, not from an instrument being incapable of legal construction, but from its not having theretofore received any such legal construction, is not a ground for refusing specific performance of a contract to sell the property.

If the boundary of property contracted to be purchased can be certainly defined, whether the extent be more or less, the purchaser will be bound by the contract; but whether he will be so bound if the boundary depends

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on a plan or instrument which is so vague as not to admit of legal construction,—*quære.*

A contract by a lessee under an ecclesiastical corporation, whilst he was in treaty with the corporation for the renewal of his lease, to sell the leasehold premises, does not necessarily throw upon him the obligation of procuring the renewal of the lease at his own expense, for the benefit of the purchaser; whether, if the vendor after the contract procure a renewed lease, the purchaser is not entitled to take it without bearing the expense of the renewal,—*quære.*

Although a good title was not shown by the vendor until during the pendency of the reference, the COURT held that the purchaser must nevertheless bear the costs of the suit, it being manifest, that, if the particular evidence which completed the title had been produced before the bill was filed, yet the suit would not have been avoided.

THE bill was filed for the specific performance of a written agreement, dated the 31st of July, 1845, in the following words:

"Memorandum, that G. L. Taylor, of &c., agrees to purchase of Robert Monro, of &c., the premises called Belmont House, partly freehold and partly leasehold, for the sum of 7,750*l.*, the purchase to be completed on the 1st day of November, next; possession to be given on signing the formal agreement, to be drawn up agreeably to the terms of this minute, when the sum of 2,750*l.* is to be paid by Mr. Taylor on account of the purchase-money. (Provision, that the residue is to be secured by mortgage on the premises.) Mr. Taylor agrees to *take the same title as Mr. Monro took on purchasing from the devisees and executors of the late Duke of Brunswick. (Provision, that Mr. Taylor should also purchase certain stables, fixtures, barges, &c., and have the option of purchasing any part of the furniture at a valuation.) Mr. Monro to bear such expenses as are usually borne by a vendor, and Mr. Taylor those usually borne by a purchaser; and each party to pay the expense of his own surveyor."

[*52]

No other agreement was signed, nor was any part of the purchase-money paid.

In the conveyance of the premises from the Duke of Brunswick to the plaintiff, in December, 1832, the freehold portion was described as a "messuage or tenement, being one of the two into which the capital messuage called Belmont House was formerly divided (describing the appurtenances), situate and being on the north-west side of the road leading from London to Wandsworth, near Vauxhall aforesaid, and abutting south-east upon the said road; and also all that plot, piece, or parcel of land or ground being part and parcel of a large piece or parcel of ground formerly occupied," &c.; "which said plot, piece, or parcel of land or ground,

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containing in front towards the east, next the turnpike-road leading from Vauxhall to Wandsworth, twenty-nine feet by admeasurement, little more or less, bounded on the south by the messuage hereinbefore described, and the forecourt and garden thereof, and on the north by the said premises, formerly occupied" &c. The leasehold portion was described as "all that piece or parcel of ground situate, lying, and being at the back part of the freehold messuage or tenement and premises now or late of Enos Smith, at Vauxhall, called Belmont House, and forming part of the garden belonging to the

[*53] *said premises, extending down to the River Thames, and on the north side thereof, next and adjoining ground and premises heretofore belonging to" &c., "and then running in an oblique direction across the said garden, at the upper end thereof, next and adjoining the freehold part of the lawn or garden late of the said Enos Smith, then running in a line down to the River Thames on the south side of the said premises, abutting on the wall dividing the said premises late of the said Enos Smith, from premises late belonging to D. Pratbernon," &c.; "which said premises were sometime since sold by the devisees in trust of Sir J. Mawbey," &c., "and were, with certain other parcels, demised by the Dean and Chapter of Canterbury to the said Sir J. Mawbey and D. Pratbernon, respectively comprised in Lot 4 of the particulars of sale." The description in the lease of June, 1831, under which the premises were then held, and in the lease of June, 1838, under which the same premises were held at the date of the contract between the plaintiff and defendant, was substantially the same as that contained in the assignment to the plaintiff. The term in each lease was twenty-one years, reserving a yearly rent of 2*s*. The premises were not assignable without the licence of the Dean and Chapter.

The plaintiff had applied for a renewal of the lease by the Dean and Chapter before the contract with the defendant, and the Dean and Chapter had required, that, in the proposed new lease, a plan of the demised premises should be inserted, showing the boundaries and dimensions thereof. Whilst the correspondence with reference to the plan was going on, it was discovered, that, in an old surrendered lease of the same premises, of the date of 1810, there was a plan, drawn on a scale of a chain to an inch, stating the superficial

[*54] quantity to be two roods. Two surveyors, one for the *plaintiff and the other for the Dean and Chapter, thereupon met, and a plan, marking the boundaries of the leasehold premises, so as to make the same contain exactly two roods, was prepared by such surveyors

on the 13th of May, 1846. By comparison of the boundaries set out in the plan thus prepared, with the boundaries in the plan on the lease of 1810, measured according to the scale there stated, it appeared that the superficial contents of the demised premises were represented as greater in the old than in the new plan. The Dean and Chapter were advised that the quantity of two roods mentioned in the old plan was an approximation only, and that the actual dimensions ought to be determined by admeasurement according to the scale; and that therefore, in any renewed lease, the plan should be drawn in strict conformity with that of 1810, but omitting the expression of the superficial quantity of two roods.

A correspondence had taken place between the solicitors of the plaintiff and defendant on the subject of the negotiation with the Dean and Chapter. On the 17th of June, 1846, the plaintiff's solicitors informed the defendant's solicitors that the Dean and Chapter, having declined to accede to the plan settled by the surveyors, they feared there was no alternative but to accept the lease as tendered by the Dean and Chapter, and obtain the licence to assign. The defendant's solicitors on the 9th of July replied, that they would advise their client, (the Western Gas Light Company, on whose behalf the defendant stated that he had purchased,) to complete the purchase, if the plaintiff would obtain a renewed lease in all respects the same as the lease of June, 1838, except as to dates.

The Dean and Chapter objected to grant the new lease *in the [*55] form thus required, and intimated that the licence should be conditional on the new lease containing the approved plan; and after some further correspondence between the solicitors of the plaintiff and defendant, the solicitors of the latter, on the 31st of July, 1846, inquired of the plaintiff's solicitors, whether they were prepared to distinguish the leasehold from the freehold. On the 6th of August, 1846, the defendant's solicitors acquainted the plaintiff's solicitors, that, as the leasehold and freehold portions of the property had not been defined as required, and as the licence to assign had been refused, the Company had no alternative but to abandon the contract and to hold the plaintiff responsible for compensation. The plaintiff immediately declined to accept the abandonment of the contract, and his solicitors intimated to the solicitors of the defendant, that the licence would be forthwith obtained. The plaintiff's solicitors accordingly, on the 20th of August, 1846, obtained the licence to

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assign, under the seal of the Dean and Chapter, and communicated the same to the defendant's solicitors on the same day.

A correspondence between the parties took place in September, October, and November, in which a different mode of settlement was proposed; but the proposal was not acted upon. The bill for specific performance of the contract was filed on the 22nd of December, 1846.

Mr. Wood and *Mr. Amphlett* for the plaintiff.

The *Solicitor-General*, *Mr. Rolt*, and *Mr. F. J. Hall*, for the defendant.

The cases cited were, *Price* v. *Strange* (1), *Green* v. *Pulsford* (2), and *Grove* v. *Bastard* (3).

[56] THE VICE-CHANCELLOR:

It is material to keep distinct the rights of the parties, as they depend upon the written agreement of the 31st of July, 1845, and the rights, if they have any, depending upon the acts of the parties subsequent to that agreement.

With reference to this distinction, I do not deny that facts existing at the time of making the agreement may be admissible to assist the Court in determining the meaning of the language; nor do I deny that an act done or letter written after the agreement may be evidence of a fact existing at the time, material to the right interpretation of the agreement. But no point of law can, I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are (as such) admissible for the purpose of determining its meaning. The acts of the parties subsequent to the agreement may be material to show that a writing does not express that which the parties intended to express in it; and proof of that may be a reason why this Court should refuse to act upon the written agreement. But that is a very different thing from deducing from the acts of the party the meaning of the agreement itself.

In this case it is not suggested that the pleadings make the case, that the agreement of the 31st of July, 1845, does not express the agreement of the parties, or that, by mistake, surprise, or otherwise,

(1) 22 R. R. 266 (6 Madd. 159).
(2) 50 R. R. 102 (2 Beav. 70).
(3) Since reported, 78 R. R 223 (2 Ph. 619).

that agreement expresses or omits the expression of anything the parties intended. In considering the effect of that agreement, therefore, I shall lay wholly out of view the long correspondence which is in evidence. The value of that correspondence for any collateral purpose may deserve a separate consideration.

I am also prepared to hold, that the agreement of the 31st of [57] July, 1845, is not to be objected to as improper for execution by this Court, on the ground of any uncertainty in its meaning or purpose. The plaintiff, at the time of making it, was owner in fee of a part of property lying within a known ambit, and lessee of the residue of the premises within the same ambit, under the Dean and Chapter of Canterbury for the unexpired residue of a term of twenty-one years, commencing at Midsummer, 1838, and which, by the practice of the Dean and Chapter, was renewable every seven years. That the nature of this interest was not known to the defendant at the time of entering into the agreement is not suggested. The defendant, at the time of signing the agreement, knew the premises comprised in it, and knew that the leasehold part was that which adjoined the river. He knew that there was no actual boundary dividing the leasehold from the freehold, and no specific representation was made to him as to the precise metes and bounds of either the freehold or leasehold part. It may have been not strictly provident in him to make the contract without inquiry upon the point. But no fraud, concealment, or misrepresentation is imputed to the plaintiff, and the obvious explanation of the apparent improvidence of the defendant is that which the defendant has insisted upon for other purposes, namely, that the good will, for the purposes of renewal, which exists in leaseholds held under ecclesiastical bodies, was relied upon by defendant as giving him substantially a permanent interest in the leaseholds, and it was therefore of little or less importance where the exact line was drawn. If, at the time of making the agreement, the boundary line dividing the freehold from the leasehold had been known, no matter in what relative proportions it had divided the property, and if a licence had been obtained to assign the plaintiff's interest in *the lease, the Court would have enforced the agree- [*58] ment. The course which was taken led to discussion between plaintiff and the Dean and Chapter, about the boundary of the leasehold. The quantity was admitted to amount to two roods; but the Dean and Chapter claimed a little more, as the result of measurement from a plan found on a deed nearly forty years old,

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The difference is stated by the defendants to be half a rood; but of this there is no evidence. In this state of things I cannot admit that the generality of the description "partly freehold, partly leasehold," necessarily creates any difficulty in the way of enforcing the agreement, if that be the only impediment. The agreement appears to me to be good as an agreement to sell to the defendant all the interest the plaintiff had at the time of the agreement.

The points upon which principally I wish to be addressed, are three: First, what is the defence upon the record. Secondly, what interest had the plaintiff in the leasehold, that is to say, was he to assign the existing remnant of the term created in 1838, or a renewed term; and thirdly, can he escape from the obligation of showing what portion by metes and bounds is freehold, and what portion by metes and bounds is leasehold.

Mr. Wood replied.

At the conclusion of the reply, the VICE-CHANCELLOR said:

Eight points have, I think, been made on the part of the defendant in this cause. Two of these—one relating to the substance of the agreement itself, the other relating to the interpretation of the agreement by reference to the subsequent correspondence—I [*59] noticed *before *Mr. Wood's* reply. Of the six points which remain, I am now prepared to dispose of four.

One question to which I requested *Mr. Wood* to direct his attention, was that which has been made at the Bar respecting the renewed lease. On this point I am satisfied there was no obligation on the part of the vendor to procure at his own expense a renewal of the lease by the Dean and Chapter. The position in which the vendor stood at the time of the agreement sufficiently explains the treaty with the Dean and Chapter on that subject. If the vendor, at the time he made the agreement, had acquired an interest by contract with the Dean and Chapter, that interest would pass to the purchaser. On the construction of the agreement, it might have been material to know, whether, if the written agreement did not comprise any stipulation for the renewal of the lease, the actual agreement between the parties might not have differed from the written agreement in that respect; and if a case of that kind were alleged in the answer, and proved in evidence, it might be a reason why the Court would not enforce the written agreement, which, according to that supposition, might comprise less than the parties intended to be comprised in it. Now, not only is

that point not put forward by the answer, but there are in the answer statements which show, that, at the time the answer was filed, the parties did not mean to represent that such had been the original agreement. It is not in the original agreement, unless in fact an actual contract was then made with the Dean and Chapter; but I was pressed with the circumstance, that if it had not been the intention to include it, the consequence must follow, that the plaintiff, by treating for the lease, must be supposed to have intended to make a present of the renewed lease to the purchaser. If the plaintiff had *obtained the renewed lease, and the defendant had claimed to have it transferred to him, I am very far from being clear that the plaintiff could have done otherwise than have made the defendant a present of it. If, after a party has agreed to sell property to another, he chooses to spend money in improving it, I do not know that he can call on the purchaser to repay him the money for that improvement (1); but the reason why the plaintiff did it is clear. By the terms of his lease with the Dean and Chapter, he was bound to send in a terrier in the seventh year of the term, and it was almost a matter of course, that, until the contract with the defendant was carried out, he would not neglect his interest in the renewal of the lease. Whether the act was improvident or not, in the absence of any allegation that the defendant really contracted for a renewed lease, I cannot infer from the conduct of the defendant, that it was intended the plaintiff should obtain a renewal. Not only is there the absence of any such averment, but so far as there is any evidence in the case, the tendency of the evidence is the other way.

[*60]

Another ground of defence was put upon certain representations, said to have been made by the vendor before the contract. (His Honour referred to statements in the answer, that the defendant believed representations as to the boundary were, prior to the contract, made to agents of the Company.) This might have afforded a material ground for resisting the suit, if it had been proved; but there is no evidence to support this suggested defence, and it is obvious, that, if it were true, there are witnesses whom the defendant might have called to prove it.

It was then insisted, that it appeared by the correspondence that the original agreement had been abandoned, and a treaty for a new agreement entered into. That clearly is not the effect of the correspondence. Modes are undoubtedly suggested for obviating the

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(1) See *Master, &c. of Clare Hall* v. *Harding*, 77 R. R. 115 (6 Hare, 296).

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difficulties, or supposed difficulties, of completing the agreement. But if I were to hold, that such suggestions were equivalent to an abandonment of the agreement, (nothing of the sort having been in the contemplation of the parties,) my decision, if attended to, would preclude parties from endeavouring to remove objections to the completion of contracts by concessions of any kind.

Another point (the last I shall now dispose of) was founded upon the defendant's notice of abandonment of the 6th of August, 1846. If nothing had taken place after that notice until the bill was filed, the question which I had to consider in *The Bishop of Exeter's* case (1), might have required consideration. But that is not the state of the case. The interval between the notice and the filing of the bill is filled up in a way which excludes that question.

The two remaining questions are: First, whether the dispute which has arisen respecting the division between the freehold and leasehold portions of the property in the contract, is a reason why the Court should not enforce the agreement; and secondly, whether, if that be negatived, the delay which has taken place, and the position of the parties on whose behalf the defendant purchased, furnish a sufficient reason for refraining to enforce the agreement. Upon both these points, I wish time for consideration.

June 26.

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THE VICE-CHANCELLOR:

The questions which I reserved for consideration were two: First, whether the dispute which has arisen respecting the division between the freehold and leasehold part of the property is a reason why the Court should refuse to enforce the agreement of the 31st of July, 1845; and secondly, if that be answered in the negative, whether the delay which has taken place, and the position of the parties on whose behalf the defendant says he made the contract, furnish a reason why the Court should not enforce the agreement.

It is only upon the former of these questions that I have in this case felt a difficulty. If the defendant, or those on whose behalf he is said to have purchased, considered time as of the essence of the contract, that point should have been made promptly. After the proceedings which have taken place with reference to the contract, I am satisfied the case is one in which a decree should be made, provided the title be good. In the consideration of that question I will follow the plaintiff's counsel, by including the question as to

(1) *Southcomb* v. *The Bishop of Exeter*, 77 R. R. 86 (6 Hare, 213).

the division between the freehold and leasehold part of the property, and treating the case as if that were the only matter in dispute.

(His Honour stated the agreement (1).)

To enforce the performance of this agreement the bill has been filed, and the ordinary and perhaps even now the best course would be, to make the usual reference as to title, a reference which the defendant asks, if I am against him upon the point as to the division, and to which the plaintiff makes no objection. But it *has [*63]
been argued, that the dispute which has arisen respecting the division between the freehold and leasehold portions of the estate, is a reason why the Court should not enforce the agreement; and as the parties have desired the expression of my opinion upon that point in this stage of the cause, I will not refuse to express it.

The entire property agreed to be sold is described in the agreement as partly freehold and partly leasehold. No defined boundary between the two existed at the time of the agreement. No plan is annexed or referred to, and no measurement or sufficient description given, showing what part is freehold or what part is leasehold. The entire property in fact consisted of the house called Belmont House, and the garden belonging to it. The property, however, was known to the purchaser at the time of the contract, and (according to my view of the case) he has made no valid objection to the decree, provided the line of division can now be ascertained; in fact no such argument was, I think, addressed to me. The solution of the question is not assisted by referring either to the conveyance to the vendor of the freehold, or to the lease under which he held the leasehold. No plan is annexed to either, nor does either contain any measurement or sufficient description of abuttals or quantities. Speaking of the property in the agreement, with reference only to what I have already stated respecting it, all that can be said with certainty is this, that the ambit of the entire property is known: that it is situate on the Thames near Vauxhall; that the leasehold part occupies the whole of the river frontage; that the freehold occupies the whole boundary farthest from the river. The two sides may be represented as parallel to each other, and at right angles to the river. Another point may also be stated as agreed upon, namely, that the line (wheresoever drawn) which divides the freehold *from the leasehold, is not parallel to [*64]
the river, but runs in a slanting or oblique line; and that the leasehold parcel, therefore, forms an irregular four-sided figure,

(1) *Supra*, p. 195.

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the sides of which, taken angularly with the river, are of unequal length. The quantity of leasehold, upon the evidence, is unknown. But, according to the terms of the contract, no stipulation was made by the purchaser as to the quantity of freehold, nor, for the reasons I have already mentioned, was it probably thought material.

If the evidence had ended here, the cause might perhaps have been disposed of without much difficulty, so far as this point goes. The evidence, however, does not end here. Negotiations were going on between the vendor and the Dean and Chapter for the renewal of the existing lease, and the Dean and Chapter required that the renewed lease should contain a plan showing the boundaries and dimensions of the demised premises. Upon tracing back the old leases which had been successively surrendered upon former renewals, it appeared that, on a lease of 1810 then in the possession of the Dean and Chapter, there was a plan showing the form and outline of the parcel, stated to be drawn to a scale of one chain to an inch, and having the quantity of two roods specifically mentioned in the body of the plan; and upon this the point I am now considering depends. Upon applying the scale to the form and dimensions of the plan, it gives, in point of quantity, rather more than two roods. The exact excess is not in evidence. The counsel for the defendant have been instructed to state that the excess will be half a rood. I have no note of the quantity represented by the plaintiff. The Dean and Chapter do not dispute the correctness of the plan, and are willing to be bound by it. They offer to renew the existing lease, but they

[*65] reserve to themselves the *right of contending that they are entitled to so much land, according to the form and outline shown on the plan of 1810, as will result from the scale, and that the expression "two roods," in the body of the plan, is to be treated only as the statement of a result, and not binding upon them, except so far as it may be consistent with the measurement for which they contend. The defendant, on the other hand, has contended, that the leasehold cannot be taken to comprise more than two roods; that the plan, however framed, must not represent a greater quantity in the whole; and that the Court ought not to compel him to complete his contract, unless the question raised by the Dean and Chapter can be now determined, which he says it cannot be in a suit to which the Dean and Chapter are not parties.

The lease of June, 1810, was a lease to the then owner of

Belmont House and premises (the freehold), under whom the vendor, the plaintiff in this suit, claims, and is evidence between the vendor and the Dean and Chapter; but it must always be borne in mind that it was not discovered until after the agreement. It is evidence in the case, but it does not enter into the question in the cause, as a representation by the vendor, upon the footing of which the agreement was made.

The reasoning which appears to me to be applicable to this case is not of a usual character. For the purpose of explaining that reasoning, it may be assumed that the vendor can make a good title, subject to the specific question under consideration, (that is to say,) that he can show a freehold title to so much as is freehold, and a leasehold title to so much as is leasehold, and, as the two make up the entire property, that he can in some sense make a good title to the whole. I am, however, of opinion with the defendant, that a vendor who contracts *to sell property described as [*66] "partly freehold and partly leasehold" does, in the absence of special stipulation to the contrary, come under an obligation to show the purchaser what part is freehold and what part is leasehold. A knowledge of that may enter materially into the beneficial use and enjoyment of the property; and I cannot bring my mind to the conclusion, that, on this point, the stipulation as to the title under which the plaintiff bought from the Duke of Brunswick alters the case. On the other hand, I am equally clear, that, if the boundary between the freehold and leasehold can be defined with certainty, the defendant could not found any objection to the performance of the contract, upon the ground only that the line dividing the freehold from the leasehold was more or less distant from the river. He agreed to buy what the plaintiff had, and (considering the value of the goodwill of a tenant holding under the Dean and Chapter,) he was satisfied to take it without any stipulation as to quantity; and if the question raised by the Dean and Chapter admits of an answer, the defendant will be bound although the decision be in favour of the claim of the Dean and Chapter. Whichever way the decision may be, the defendant will get all he contracted for. Neither construction can deprive him of anything. Certainty as to the fact is all he can contend for. Uncertainty is all he can complain of. There are, therefore, two questions—First, Is there uncertainty in any sense? and, secondly, If so, is it an uncertainty of a nature which ought to prevent the Court from enforcing the agreement?

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These questions, in the present stage of the discussion, depend upon the lease and plan of June, 1810. If that lease and plan are uncertain in this sense,—that they are so vague as not to express and define what they were intended to do, and that no Court could
[*67] construe *them,—the argument of the defendant ought, perhaps, to prevail. But my individual impression is so strong in favour of that lease and plan not being uncertain in the sense above explained, that I have no hesitation in excluding that view of the case.

In what sense, then, if any, can it be said that the lease and plan are uncertain? In this sense only: that, if the Dean and Chapter shall persevere in their claim to something more than two roods, and the defendant shall be advised to insist that the Dean and Chapter are entitled to no more than two roods, it will, until a Court shall have determined what the deed actually expresses, be in some sense uncertain where the division line between freehold and leasehold lies. It is the uncertainty of the law, but which, however, when declared, determines what was the construction from the beginning. Is such an uncertainty, in a case circumstanced as this is, a ground for refusing specific performance, no other objection existing? If there had been any stipulation that the quantity of the leasehold was only two roods, the objection ought, perhaps, to prevail; for, in that case, a decision against the Dean and Chapter, in their absence, might afterwards be altered in a proceeding to which they were parties, and the defendant might be damnified by getting less than he had contracted for. But if that consequence can by no possibility arise, is the objection good as a defence to the suit? Suppose I should be prepared to decide the question against the defendant in this suit by holding, as matter of construction, that "two roods" was to be considered only as an errroneous result, and that the form in the plan and measurement by the scale must determine the right, how could the defendant be damnified by my compelling him to perform the contract? If advised by competent
[*68] advisers that my decision was correct, *he would, of course, acquiesce, and would have as much freehold land as he was entitled to, and the certainty he required also. I think I ought not, if that were my view, to refuse the plaintiff a decree, because the defendant reserves to himself a right to claim more against the Dean and Chapter than I should give him? And in the alternative, if I were to be of opinion that the Dean and Chapter were wrong, the purchaser will get all he is entitled to. In either view of the case, therefore, as between the Dean and Chapter and their lessees, it appears to me the

circumstances as to the boundary of the freehold and leasehold portions of the property do not raise a defence to this suit. I do not rely upon the stipulation as to the title to be taken by the defendant, although that may be material.

I shall at present only direct the usual reference.

The Master found that the plaintiff could make a good title; and that he first showed such good title on the 3rd of November, 1849, when the attested copy of the lease of 1810, and the plan thereunto annexed, was produced by the plaintiff's solicitor, and left in the office. The defendant excepted to the report of title, and the plaintiff to the report as to time.

1850. *Feb.* 18.

Mr. Wood and *Mr. Amphlett*, for the plaintiff.

Mr. Rolt and *Mr. Micklethwaite*, for the defendant.

The cases cited on the question of costs, notwithstanding the time at which the title was shown, were *Long* v. *Collier* (1), *Scoones* v. *Morrell* (2), and *Sidebotham* v. *Barrington* (3).

THE VICE-CHANCELLOR: *Feb.* 20.

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Upon the plaintiff's exceptions, I think the Master's report, finding that a good title was not shown until the plaintiff delivered the attested copy of the lease of the 30th of June, 1810, is right.

Had I been in the situation of the Master, I think I should, upon the strong inference furnished by the answer, the case stated for *Mr. Amphlett's* opinion, and certain of the letters, have called upon the defendant for an affidavit that he or his agents had not, before the bill was filed, seen the plan in the margin of the lease of the 30th of June, 1810, or some copy of it, or the particulars of it, furnishing him with the information which was formally supplied by the attested copy of that lease. And if such affidavit had not been furnished, I should, I think, have found that a good title had been shown before the bill was filed. This course, however, was not taken; and the defendant's counsel has been instructed to state, that the inference which I should have drawn from the evidence as above suggested would have been erroneous, and that an affidavit to that effect would now be made, if I required it.

I shall not require it, but dispose of the case as it stood upon the evidence before the Master, and now stands before me. Upon that

(1) 28 R. R. 79 (4 Russ. 267).
(2) 49 R. R. 351 (1 Beav. 251).
(3) 59 R. R. 495 (5 Beav. 261).

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evidence, I cannot conclude that any copy of the plan in the margin of the lease of the 30th of June, 1810, or the particulars of it, was furnished by the plaintiff before the bill was filed, as part of the abstract of his title. It is clear, the plan was referred to in some discussions between the parties, but not, I think, upon the point of title; and it is consistent, at least with possibility, that no copy of

[*70] the plan, or any particulars of it, may have been produced. *In strictness, therefore, I think the Master's conclusion was right, and I overrule the plaintiff's exception.

Upon further directions and costs, the rule as to interest is stated by Sir EDWARD SUGDEN precisely in the way in which I stated it during the argument. Equity considers that as done which is contracted to be done, and, in the absence of something special to control the rule, gives the profits of the thing sold to the purchaser from the time fixed for the completion of the contract, and interest on the purchase-money to the vendor from the same time. In *De Visme* v. *De Visme* (1), the LORD CHANCELLOR lays down the rule in this same way.

In this case there is nothing special to control the rule, unless it is to be found in the circumstance, that a good title was not shown until the attested copy of the lease of the 30th of June, 1810, was delivered. But for the reasons I am about to mention, for the manner in which I dispose of the costs of the suit, I think the non-completion of the abstract is not a reason for controlling the general rule.

With reference to the costs of the suit, I am fortified by the clearest authority, in holding that the time when a good title was shown is not conclusive upon the question of costs, although it may materially affect that question.

In deciding who shall pay the costs of the suit, the Court must inquire by whom and by what the litigation was occasioned. This is stated and acted upon by the COURT in the cases cited at the Bar. In this case, I have inquired whether, if the lease of the

[*71] 30th of June, *1810, had been produced before the bill was filed, the suit or any part of it would have been avoided. The answer to this inquiry in the negative is so manifest upon the answer and the correspondence, that it cannot be necessary that I should go into it. I think the plaintiff is entitled to the costs of the suit.

Upon the question of title, assuming (what in fact I do not know) that there is a substantial variance between the scale and the "two

(1) 84 R. R. 83 (1 Mac. & G. 336).

roods" written on the plan in the margin of the lease of the 30th of June, 1810, I think there is no such ambiguity in the construction of the lease with the plan, as to vitiate the lease on the ground of uncertainty, or make it proper that I should deprive the plaintiff of the benefit of his agreement with the defendant. The lessors will be subject to the common rule of construction against grantors, unless they can make out that the plan and scale together give them more than that rule would give them.

I have not thought it necessary to rely on the special clause, which requires the purchaser to take such title as the plaintiff had from the Duke of Brunswick; but I may observe, that I think that would be sufficient to entitle the plaintiff to a decree in this case.

[From this decision the defendant appealed, as reported in 3 Mac. & G. 713.]

1851.

The *Solicitor-General* and *Mr. Amphlett*, for the plaintiff and in support of the decision of the VICE-CHANCELLOR, contended that the defendant had no right to rescind his contract merely on the ground of the vendor's inability precisely to fix the boundary between the leasehold and freehold parts of the premises, the objection being, under the circumstances of the case, perfectly trivial, and at most affording only a ground for a claim to compensation; that the Court would look at these circumstances before refusing to assist the plaintiff, the question being, as stated by Lord COTTENHAM, in giving judgment in *Grove* v. *Bastard* (1), "what is the value of the objection." They submitted that the defendant could set up no valid claim to have a renewed lease merely on the ground, that at the time when the contract was entered into, the plaintiff was negotiating for such lease with the Dean and Chapter; that the correspondence showed a waiver on his part of the objection as to not distinguishing the freehold and leasehold portions of the premises; and that the defendant *in fact had that which under the contract he stipulated for, namely, such title as the plaintiff took from the devisees and executors of the Duke of Brunswick. They referred to *Long* v. *Collier* (2), *Freme* v. *Wright* (3); and, on the question of time, to *Taylor* v. *Brown* (4), *King* v. *Wilson* (5).

[3 Mac. & G. 716]

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Mr. Rolt, *Mr. Malins*, and *Mr. Micklethwaite*, for the appeal,

(1) 78 R. R. 223, see p. 224 (2 Ph. 619, see p. 621).
(2) 28 R. R. 79 (4 Russ. 267).
(3) 20 R. R. 313 (4 Madd. 364).
(4) 50 R. R. 152 (2 Beav. 180).
(5) 63 R. R. 32 (6 Beav. 124).

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contended that the objection raised by the defendant to complete the contract was valid and substantial, and that a decree for specific performance, under all the circumstances, ought not to be made; and, on this point, they referred to *Price* v. *Strange* (1), *Stapylton* v. *Scott* (2), *Dawson* v. *Brinckman* (3). They submitted that the case was not one to which the principle of compensation could be applied; that no waiver by the defendant had been established, he having done nothing which had that effect since he became aware of the objections existing to the title; and that what had occurred showed that he would not take the premises with a title as free and unshackled as that under which the Duke of Brunswick held them. They referred to [*Squire* v. *Campbell* (4), *Burnell* v. *Brown* (5), *Jones* v. *Mudd* (6), *De Visme* v. *De Visme* (7).]

The *Solicitor-General*, in reply, referred to *Osbaldeston* v. *Askew* (8).

1852. *Feb.* 26.

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The LORD CHANCELLOR, after mentioning the facts of the case and reading at length several of the letters forming part of the correspondence above referred to, stated the decree of the VICE-CHANCELLOR of the 20th February, 1850, and then proceeded as follows:

The defendant has appealed against this decree, but I am of opinion that it was perfectly right, except so far as it relates to the plaintiff's exceptions. It has been objected that the agreement ought not to be enforced on account of the generality of the description, "partly freehold and partly leasehold;" but this objection is wholly groundless. I am not aware that it has ever been held that a contract for the purchase of freehold and leasehold property must define the precise boundaries or quantities of each; nor do I think that, on principle, the indefiniteness of such a description in a purchase contract ought to be deemed a justifiable reason for not enforcing it.

If the boundaries are known to the purchaser at the time of the contract, then the indefiniteness of the description is manifestly immaterial; and, even if they are not known at the time, and the purchaser should find that the quantity of freehold is less than he expected, and this should be very prejudicial to him, still, if, as in the present case, there is no proof that there was any fraud,

(1) 22 R. R. 266 (6 Madd. 159).
(2) 10 R. R. 179 (16 Ves. 272).
(3) 3 Mac. & G. 53.
(4) 43 R. R. 231 (1 My. & Cr. 459).
(5) 21 R. R. 136 (1 J. & W. 168).
(6) 28 R. R. 22 (4 Russ. 118).
(7) 84 R. R. 83 (1 Mac. & G. 336).
(8) 25 R. R. 21 (1 Russ. 160).

concealment, or misrepresentation, on the part of the vendor, the purchaser would only have to blame his own imprudence in not enquiring what were the relative quantities of freehold and leasehold *before he entered into the contract. As to the statement in this case, that representations respecting the boundaries were made prior to the contract to Thomas Stephens, a director of the Company, there is no proof of this whatever. [*719]

It is, however, urged that the correspondence shows that the original agreement had been abandoned, and a treaty for a new agreement entered into: this, however, is not the case. The letters merely amount to a suggestion of modes of obviating the difficulties, which, in the opinion of the purchaser, stood in the way of completing the purchase. Again, it is said that the defendant gave notice of his abandonment of the contract, and that, under the circumstances, that notice had the effect of putting an end to the contract: but it appears from Mr. James Phillips' evidence, that the notice was afterwards waived by the subsequent conduct of his firm; and, besides, the circumstances of the case were not such as in my opinion entitled the defendant to give the notice.

It is objected, indeed, that the dispute which has arisen respecting the division between the freehold and leasehold portions of the estate, is a reason why the Court should not enforce the agreement; but I cannot assent to this. I will assume, for the purpose of the argument, that a vendor, who contracts to sell property described as partly freehold and partly leasehold does, in the absence of specific stipulations to the contrary, come under an obligation to show the purchaser what part is freehold and what part is leasehold, and that, in the present case, the stipulation that the purchaser should take the same title that the vendor took from the devisees and executors of the late Duke of Brunswick, *does not remove that obligation; for, a knowledge of the tenancy of the different portions of the estate may be of the utmost importance in regard to the beneficial use of the property. But, assuming this to be the law, I think that by the production of the lease of 1810, the vendor sufficiently fulfilled his obligation to show what part is freehold and what part is leasehold, even supposing it to be wholly uncertain whether the specification of two roods is to be taken as conclusive against the Dean and Chapter, or whether the dimensions ought to be determined by the application of the scale, and a larger extent be thereby determined to be of leasehold tenure. [*720]

I will put out of the question the argument that the uncertainty

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is only an uncertainty of the law, an uncertainty that could be terminated by a decree, which when pronounced determines what was the contract from the beginning: I will assume, for the purpose of the argument, that there is an uncertainty which could not be removed. Yet, assuming this, it is such an uncertainty as ought not to be deemed a ground for refusing specific performance under the circumstances of the present case. It is agreed on all hands that the leasehold part occupies the whole of the river frontage, and that the freehold occupies the whole boundary furthest from the river. The only uncertainty is, what is the exact position of the division line between the freehold and the leasehold, and, consequently, whether the quantity of the leasehold is only two roods or somewhat more, say, two roods and a half. I lay no stress on the smallness of the additional quantity claimed by the Dean and Chapter: I will suppose it to be of the utmost importance to the purchaser that the leasehold should consist of two roods only. Supposing this to be so, and assuming, nevertheless, that the additional part *which is claimed by the Dean and Chapter is really leasehold, or assuming what would certainly be not more prejudicial to the purchaser, that it is wholly uncertain whether the part is freehold or leasehold, and that such uncertainty never could be removed, the purchaser has sustained no damage. He has all that the vendor had, and all that he, the purchaser, contracted to buy; for, considering the value of the good-will of a tenant holding under the Dean and Chapter, he was satisfied to take the estate without any stipulation as to the respective quantities of freehold and leasehold. All that he has to do is to consider that the leasehold embraces the larger rather than the smaller of the two quantities of one or other of which it is admitted to consist, and to deal with the estate accordingly in the purposes to which he may think fit to apply it.

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After such a contract for purchase as that which was entered into, if two roods and a half had been the quantity specified in the body of the plan of the lease of 1810, it cannot be pretended that the purchaser would have been entitled to resist a specific performance, when he had purchased under a general description which did not define the relative proportions of freehold and leasehold, and when there is no proof that any representations were ever made to him as to the quantity of the freehold or leasehold or the boundaries between them. How then can it be maintained for one moment that the purchaser is entitled to resist a specific performance,

merely because the quantity specified in the body of the plan is two roods while the scale gives and the Dean and Chapter claim about two roods and a half, when he purchased under the general description of partly freehold and partly leasehold, and when there is no proof that at the time of the contract, he was ever led to suppose, or had any reason to suppose, *that the leasehold consisted of only [*722] two roods, or that the boundary line between the freehold and the leasehold was in one position rather than another. To resist specific performance on these grounds, when it could not have been resisted if the quantity specified in the body of the plan had been two roods and a half, is to resist specific performance merely on account of the possibility of the quantity of freehold being greater, and the bargain somewhat more beneficial in the present case, than it would have been if the quantity specified in the body of the plan had been two roods and a half, and there had been no doubt that the leasehold consisted of as great an extent.

As to the notice in Mr. Finch's letter of the 25th July, that the fine settled and paid for the renewal of the lease was expressly on an understanding that the new lease should contain such description and plan of the demised premises as should be approved by the Dean and Chapter, that furnishes no reason why the contract should not be enforced; for independently of the consideration that the defendant purchased without any stipulation as to the relative quantities of freehold and leasehold, the letter of Messrs. Phillips & Son, of the 20th July, 1846, renders that notice immaterial; for, in that letter, they say, "if you obtain a licence to assign to our client the existing lease without any condition, so that we may hereafter object to unreasonable deviations, we think we ought to be satisfied, and shall therefore recommend it." The defendant has got this licence to assign the existing lease without any condition; and, if the Dean and Chapter should afterwards, on renewal, insist that the plan of the lease of 1810 should be adopted omitting the specification of the quantity, or that the leasehold should be stated to amount to the quantity for which the Dean and Chapter have *contended, this would be merely a demand which [*723] the defendant was prepared to expect, and notwithstanding the expectation of which, his solicitors expressed their willingness to accept the assignment of the lease.

It is further contended, that the delay which has taken place, and the position of the Company on whose behalf the defendant purchased, furnish a reason why the Court should not enforce the

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agreement. It is submitted by the answer that by reason of the serious and prejudicial delay that had arisen previously to the month of August, 1846, in the completion of the purchase, which prevented the Company from commencing the manufacture of gas and proceeding with the building operations which were absolutely demanded and had been determined on by the Company on the defendant entering into the contract, the defendant was justified in abandoning the contract, and the more especially as the Company had been compelled, by reason of such delay, to purchase other and less advantageous premises, for the purpose of carrying on the manufacture of gas: but there does not appear to be any evidence of this, or that the plaintiff or his solicitor was aware of the purpose for which the defendant or the Company made the purchase. But, even if that were otherwise, the defendant might have at once put an end to the delay by assenting to the claim of the Dean and Chapter, which he might do without having any cause to complain on that account, as he purchased without any stipulation or understanding as to the quantity of the leasehold.

Another objection urged by the defendant is this, that the plaintiff contracted or was bound to procure at his own expense a renewed lease for the defendant: but this is not so. It is true, that [*724] the plaintiff, prior *to the contract was in treaty for a renewed lease, and after the contract he made great exertions to procure a renewed lease: but the contract itself is silent respecting any renewal, and the plaintiff in the absence of express words must be taken to have only contracted to assign what he himself had either in law or in equity, unless there are special circumstances to create an obligation independent of the contract; and no such circumstances exist. Until the determination of the legal interest of the plaintiff by an actual assignment, it was to be expected that the plaintiff would endeavour to procure a renewal, if it were only with a view to his own benefit, in the event of the breaking off of the contract. But, admitting that he did so for the benefit of the purchaser alone, as from the general tenor of the correspondence might appear to be the case, this did not create an obligation on the part of the plaintiff to procure such renewal. If it amounted to a promise or understanding that he would procure a renewal, there is no proof of its being for any valuable consideration, and therefore it was not one which a court of equity would enforce, even if it had not been waived by the defendant, as it would seem to have been by the letter of the 20th July, 1846.

With reference to the defendant's exceptions, I am of opinion that for the reasons which I have already given, a good title is shown, notwithstanding the uncertainty as regards the boundary line to which I have adverted. With respect to the plaintiff's exceptions to the report as to the time when a good title was shown, I think they ought to be allowed. Looking to the correspondence, I conceive that the defendant or his agent must be deemed to have known in the course of the correspondence before the institution of the suit, what was the precise point of dispute between the *plaintiff [*725] and the Dean and Chapter, and consequently that, for the reasons I have already given, the dispute did not show that a good title could not then be made; and I think therefore interest ought to be allowed from the time fixed for the completion of the contract.

With regard to the costs, even supposing that a good title was not shown till the attested copy of the lease of 1810 was left in the Master's office, I agree with the VICE-CHANCELLOR that the same kind of litigation would have arisen even if the lease of 1810 had been produced before the filing of the bill, and that therefore, the plaintiff is entitled to the costs of the suit.

The result is, that the appeal must be dismissed with costs, and that the plaintiff's exceptions to the report must also be allowed.

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1849. *June* 12, 23, 25, 27, 28. *July* 4.

(8 Hare, 72—96.)

WIGRAM, V.-C. [8 Hare, 72]

Disputes having arisen between a Railway Company, and a contractor employed in making the railway, the Company insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works themselves, and the contractor resisting such claim, imputing the backward state of the works to the acts of the Company, and holding forcible possession; collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other; and the completion and opening of the railway for traffic being in the meantime delayed, the COURT, on the application of the Company, restrained the contractor from continuing on the line or interfering with the operations of the Company, directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the Company's engineer, and an issue to try whether the Company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on

(1) *Kirk* v. *The Queen* (1872) L. R. 14 Eq. 558.

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unexecuted works, as all other directions, until after the trial and the report.

Consideration of the principle on which the Court may, in certain cases, interpose to prevent a contract from being performed in specie,—protecting the legal or supposed legal right of the party seeking such assistance, and preserving to the other party the substantial benefit of the specific performance.

MOTION for an injunction to restrain the defendant, his agents, servants, and workmen, from retaining possession of or entering upon or interfering with the main line of the plaintiff's railway from Hapton to Colne, and the branch line of railway from the main line to the intended junction with the Manchester and Leeds Railway at Todmorden, and the works connected with the main and branch lines respectively, or any part of such lines of railway or works respectively; and from proceeding in any manner to construct, complete, or repair the works, by the contract of the 22nd of December, 1846, agreed to be constructed, completed, or repaired, or any of such works; and from removing, or causing or permitting to be removed, the materials of any description being on or about the said lines of railway and works, or any part thereof respectively, or any of such materials; and from in any manner interfering with or disturbing the possession or use or enjoyment by the Company, their officers, contractors, agents, servants, or workmen, of the said lines of railway and works, or any part of the same respectively; and from in any manner obstructing or preventing the Company,
[*73] their officers, contractors, agents, servants, or workmen, *from constructing, completing, or repairing the said works by the contract agreed to be constructed, completed, or repaired, or any of such works; and from in any manner interfering with or preventing the Company, their officers, contractors, agents, servants, or workmen, in the use or employment of the said materials in constructing, completing, or repairing the works, or any of them.

The defendant Hattersley (1) contracted with the plaintiffs to make the portion of their railway mentioned in the foregoing notice of motion, of about nine miles in extent. The terms of the contract were expressed in an indenture of the 22nd of December, 1846, made between the same parties, and referring to plants, sections, and specifications of the work. By this indenture, which was of great length, the defendant covenanted forthwith to commence and well and substantially construct and complete the said portions of

(1) The contractors were Richard and William Hattersley; but, William being dead before the institution of the suit, any reference to his name in the report is unnecessary.

the railway according to the specifications and drawings, or such additional or other directions, plans, and drawings, as the Company or their engineers might from time to time furnish; and to keep the works and permanent way in repair for one year after completion, and provide all the materials for such works and reparation. The Company were to pay the defendant 129,885*l.* 10*s.* for the specified works, and for the additional or altered works, not comprised in the specification, at the prices mentioned in a schedule. The works were to be completed and finished to the entire satisfaction of the Company and their consulting and acting engineers; and in the execution of the works the contractors were strictly to obey the directions and instructions *of the engineers in regard to [*74] the manner of carrying on the same, and to complete the whole of the works and railway fit for the use of the public and to the satisfaction of the Government inspector, on or before the 1st of January, 1848; but in case possession of the land required for the Burnley viaduct should not be given on or before the 1st of January, 1847, then within such time after the 1st of January, 1848, as should be equal to the time between the 1st of January, 1847, and the giving of such possession. All materials brought or left upon the site of the railway by the defendant, for the purpose of the works, to be considered the property of the Company, and not to be taken away without the consent of the Company. If the engineer should consider any part of the works to be improperly or imperfectly executed, the defendant, upon notice in writing being given, to cause the same to be immediately taken down and executed properly, according to such notice, to the satisfaction of the engineer; and if the defendant should make default in complying with such notice within three days, the agents of the Company might enter upon the works in respect of which the notice should have been given, and remove the same and the materials, and cause the works to be properly executed according to the notice, and deduct the expense of the workmen and materials employed in such removal and completion out of any monies which might be or become due to the defendant, or the defendant to pay the same to the Company; and any such removal or substitution, or the exercise of any other power by the Company, was not to vitiate the contract or affect the same, except by giving the Company additional securities for the satisfactory performance thereof. If, in the opinion of the Company, a sufficient number of workmen, horses, wagons, &c., or sufficient materials, should not be employed by the defendant in the

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execution of *the works, the Company might give him notice to provide such additional workmen, horses, wagons, &c., and materials, as the Company might think necessary; and if the same should not be provided within six days after any such notice or notices, the Company might provide the same at the expense of the defendant, and the Company to be at liberty to use the materials provided by him. If from any cause, other than his insolvency or bankruptcy, the defendant should be prevented or delayed in proceeding with and completing the works, or keeping the same in repair, or should not so proceed according to the specifications, plans, or drawings, or the additional instructions, and to the satisfaction of the Company, it should be lawful for the Company, if they should think fit, to give the defendant a notice or notices in writing, under the hand of their secretary, requiring the defendant to enter upon and commence or regularly proceed with such works and keep the same in repair as aforesaid; and in case the defendant should, for seven days after such notice, refuse or neglect so to commence or regularly proceed, or in case he should become insolvent or bankrupt, it should be lawful for the Company to employ any other persons or workmen, either by contract, measure and value, or otherwise, to proceed with the works and to complete and keep the same in repair, and for that purpose to make use of all the materials provided by the defendant and then being on the works. The Company to be at liberty to pay for such materials, completion, and repairs, by and with the monies which should be remaining due or would have been due to the defendant if he had completed the works according to the contract; and thereupon the monies, which, previously to such default, should have been paid to the defendant on account of any work and materials then already done or provided, to be considered as the full value, and be taken by him in *full payment and satisfaction, not only of and for the works in respect of which any payment might have been made, but likewise of and for any work and materials which the defendant should have then done or provided, although no payment might have been previously made in respect thereof. And that all the balance and other monies whatsoever which then or thereafter would have been or become due to the defendant under the contract, if this clause had not been inserted and he had fulfilled the contract, together with all the materials and machinery, &c., provided for the works, and then upon or about the site, should, upon such default, not only become applicable for the completion of the works by the Company, but

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should be considered as a security to indemnify them from any loss they might sustain by reason or from any such cause as aforesaid; and the Company might sell the materials, machinery, &c., for that purpose, and the defendant to make good and pay the deficiency of the charges, if any, which the balance, materials, &c., might be insufficient to cover. And the Company thereby covenanted, (subject to the deductions for penalties, damages, and otherwise,) at the end of each calendar month to pay the defendant 9-10ths of the whole amount or value of the works which should have been actually performed, by admeasurement, according to the list of prices annexed, the same to be certified by the engineer, until the amount retained should be equal to 1-20th of the 129,885*l.* 10*s.* and at the end of every succeeding month to pay to the defendant the full value of the works so ascertained and certified. The value of additional or altered works to be from time to time certified, and paid at the times and in the same manner, and subject to the same deduction of 1-10th of such amount or value. Three months after the whole works should be so certified to be complete, the Company to pay 3-4ths of the sum so retained, and *within a month after the [*77] end of the year during which the works were to be kept in repair by the defendant, (such complete repair being certified,) to pay him the balance, with interest at 4*l.* per cent. on the sums retained, from the completion of the works until the days of payment.

The tender under which the contract was entered into had been accepted early in 1846, and some works had been done, and monies paid on account thereof, towards the 129,885*l.* 10*s.*, before the date of the contract. The works subsequently proceeded. The bill was filed on the 9th of June, 1849. The bill alleged, that possession of the land for the Burnley viaduct was given on the 28th of April, 1847, and, according to the contract, the whole of the main and branch lines should have been completed on the 28th of April, 1848; and that, after taking into calculation all delay or retardation of the works which the Company had authorised, the time for the completion of the main and branch lines expired at the latest on the 1st of August, 1848. The bill stated, that part of the line from Hopton to Burnley was opened for traffic on the 18th of September, 1848, and the residue, from Burnley to Colne, on the 2nd of February, 1849; that only some excavations had yet been made on the branch line; that the main line, though opened and sufficient for present safety, was still unfinished and incomplete. The bill alleged, that the delay had arisen from the wrongful acts, neglects,

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and omissions of the defendant, and that the Company had in all things observed and fulfilled the contract; that, in order to proceed with the traffic securely, continuous progress in the works and skilful workmen were required, but, since the said opening, the defendant had either wholly omitted to execute, or had incompletely or insufficiently executed, the works *which by the contract he had [*78] agreed to execute; that, on the 9th of March, 1849, the Company served the defendant with a notice regularly to proceed with the works and keep the same in repair, and that, in case of neglect or refusal for seven days after the service of such notice, the Company would exercise the powers given to them by the contract for the execution of such works and the repair of the same, and hold him responsible for the losses, charges, damages, and expenses thereby occasioned, and would avail themselves of all forfeitures, penalties, securities, and indemnities authorised by the contract, and all other remedies under the same.

The bill stated the steps taken by the Company in pursuance of their notice to enter into possession of the line and the works thereupon; that, to that end, the Company, on the 30th of March, placed some workmen on a part of the road, who were driven off on the following day by a larger number of men employed by the defendant; that, from the 30th of March until the 14th of May, collisions frequently took place and were daily expected between the workmen employed by the Company to enter upon and finish the works at various points of the line, and the workmen employed by the defendant; that the latter were on several occasions brought before the magistrates at Burnley, under the stat. 3 & 4 Vict. c. 97, s. 16, violent assaults having been committed by the workmen on each side; that the magistrates had refused to do more than direct that each party should go on without interfering one with the other; and that, owing to such conflicts, and the intermixture of the labourers employed on each side, very little had been done towards the completion of the line since the Company had so attempted to take possession.

[*79] The defendant had met the proceedings of the Company *by a counter notice, dated the 9th of April, whereby he stated that they had caused numerous delays in the progress of the works by not delivering to him the possession of land, not providing him with plans and orders, and from time to time not paying him for a great portion of the works he had executed; that, when he had provided numbers of workmen and horses to proceed with rapidity, he was directed by the engineer to reduce the quantity of work, the Company being confessedly without funds; that such delay caused him

great loss in the keep and sale of horses, rents, wages, &c.; that he had been regularly proceeding with the works, for the last fifteen weeks, without having during that time received any monies on account thereof; that a large sum was due to him; that if any delay had taken place, it had arisen from the wrongful acts and omissions of the Company; that he did not refuse or neglect, nor intend to refuse or neglect, to proceed with, or delay proceeding with, the said works, so far as the Company would, by performing their parts of the contract, enable him so to do; and the defendant thereby discharged the Company from employing workmen to proceed with or interfere in the execution of his works, and further gave notice, that in case they interfered with his works, (except by exercising the ordinary superintendence under the provisions of the contract,) he should adopt such legal and equitable means as he might be advised, not only for resisting such interference, but also for obtaining redress for such illegal acts.

The bill stated, that, on the 12th of May, 1849, the defendant commenced an action of covenant against the Company, to recover what he claimed to be owing to him from the Company under the contract, and for damages for the alleged breach of the contract by the Company; that, not only were the works to be executed *under [*80] the contract most numerous, and the rates of payment of great variety, but the specification had in numerous instances been varied, added to, and abandoned as the contract authorised, and in numerous instances the works had been left unexecuted, or not executed in time, or improperly executed, by reason whereof penalties and other deductions were claimed by the Company; that the Company claimed payment for works done by them before and since the action was brought, and for works which they had still to execute; that, if any balance had been due to the defendant when the action commenced (which the Company denied) the amount ultimately payable to them would greatly exceed such balance; that, from the complicated nature of the said account, and the works so performed, it was impossible that a jury could determine the rights of the Company and the defendant in the subject of this action.

The bill prayed a declaration of the alleged rights of the Company under the contract; it prayed an injunction until the hearing of the cause, and thenceforth perpetually, in the terms of the motion above stated; and also, that the defendant might be restrained from proceeding in his action at law against the Company, and from commencing any other action against them

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under the contract, or relating to the works thereby agreed to be executed (1).

The affidavits were voluminous; they were directed chiefly to the questions of the causes of the delay in the completion of the works, and the actual state of the works at the time when the Company had attempted to take *the possession. The affidavits on behalf of the Company stated the embankments to be in an unfinished and dangerous state, the ballast to be largely insufficient, so that the line undulated, that the permanent way required to be relaid, that the number of workmen employed by the defendant was not one-fourth of the number which was needed. The affidavits of the defendant and his witnesses, denied the insufficiency of the works, and alleged that the delay (if any) had been caused by the Company or their engineers, and that due progress was being made when the Company entered upon the works.

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The Company denied that they had caused the delay in the completion of the works, and alleged, that possession of the land was duly given, and the plans and orders duly furnished. The Company admitted that they had requested the quantity of the work to be reduced from October, 1847, to January, 1848, but denied that Hattersley was under the necessity of doing so; and alleged, that, inasmuch as he was benefited thereby, it was agreed between him and the engineer, that he should claim no compensation on that account. It was admitted, however, that the delay might reasonably entitle Hattersley to an extension of time, until the 1st of July, 1848. The affidavit of the defendant denied that he had derived any benefit by such stoppage, and asserted, on the contrary, that he had incurred loss thereby, for which he had not agreed to waive, but had intended to claim, and did claim compensation.

The defendant denied that the reports of the engineers of the Company accurately represented the state of the line; and asserted the truth of the statement contained in his notice of the 9th of April, that the Company had deprived him of the use of a locomotive engine, *and thereby prevented him from removing the ballast, which had become mixed with clay, and replacing it with other ballast, and completing the embankment. He alleged that the workmen who had been put on the works by the Company were of no use, and had in fact impeded his own workmen in their operations for the maintenance of the permanent way; and he

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(1) It has been thought useful to show the frame of the bill, although this part of this case is immaterial to the question on the motion.

repudiated any liability to pay for the expense of the employment of such workmen by the Company.

The defendant alleged, that he had always had in view, and attended as well to the performance of his contract, as to the public safety; that the conduct of the officers and workmen of the Company had been violent and illegal; and that, in particular, on the 11th of May, the magistrates of Burnley had bound over the engineer of the Company, and several of their workmen in recognizances to keep the peace; and that about thirty of such workmen had been bound over to appear at the next general quarterly Sessions for the county, to answer an indictment for a riot.

The affidavits for the Company stated, that they had from time to time paid Hattersley monies, amounting altogether to 172,674*l.* 10*s.* 7*d.*, which exceeded what had become payable to him after deducting the expenses incurred by the Company since the 16th of March, 1849, when the seven days' notice expired. The defendant denied such statement, and asserted that a considerable sum was due to him; and by an account which he delivered on the 3rd of April, 1849, he claimed, for works executed to that day, interest, and compensation for losses by keep of horses, additional rents, &c., 222,873*l.* 15*s.*

The defendant had offered to give up possession of the works upon a general reference to arbitration of all *matters in difference [*83] between him and the Company. The Company offered to refer the question of what was due to the defendant under the contract, but would not submit to a general reference. The defendant by his affidavit submitted, that the action ought to proceed, and that there was nothing to prevent a court of law from administering substantial justice in the case. He stated also, that it would be a heavy loss to him if he were deprived of the opportunity of carrying out his contract to its natural termination; and he further submitted, that, inasmuch as his contract contained no express covenant by the Company to permit and suffer him to carry out his contract to the close, he might be remediless at law, should this Court interfere by injunction, as the Company sought.

The *Solicitor-General* and *Mr. Bird*, for the Company:

The bill is brought to enforce the performance of a contract, in which time is essential, and which the Company have no means of enforcing except by the aid of the Court. They are unable to obtain any effectual aid or protection from the justices of the peace.

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Not only will the benefit of the contract be lost to the Company if they are left to assert their rights by a prolonged litigation at law, but the public safety, for which the Company is responsible, will be in the meantime endangered. It is only by restraining the defendant from doing acts which exclude, wholly or partially, the Company from that exclusive possession of the line to which the express terms of the contract entitle them, that the Company can have the specific benefit for which they have stipulated. In another point of view, the application of the Company may be founded upon their right to prevent the licence under which the

[*84] defendant has *been put into possession of, or allowed to enter upon the line for a specific purpose, from being converted into a means of withholding from the Company the use of and power of dealing with their own property. In either point of view, it is clear that the injury to the Company, by excluding them from the use of the railway for an indefinite period, the defendant neither completing the works himself, nor allowing the plaintiffs to complete them, will be irreparable. (The case of *Spencer* v. *The London and Birmingham Railway Company* (1) was referred to.)

Mr. Wood, *Mr. Bacon*, and *Mr. Toller*, for the defendant, submitted, that the case was one of the first impression. The Company must state their case in one of two forms—either that the defendant was a trespasser without colour of right, or that he was in possession under the contract, which entitled him to complete a certain amount and extent of work, and to claim for such work a certain payment. In the first case, treating the defendant as a trespasser without right, it was not a case in which this Court would interfere: *Davenport* v. *Davenport* (2). In the second case, considering the defendant as proceeding under the contract to complete works which both parties agreed in representing as being unfinished, still, although they disagreed as to the causes of their being so unfinished, there was no equity to deprive the defendant of the means of specifically performing his contract, and thereby leaving him to prove before a jury, or in some other manner, as best he might, the amount of profit or advantage which had been diverted from him. The case was especially one which, both from the relative position and rights of the parties, as well as from the conflict of evidence on the numerous questions of fact, the Court would leave the parties to their legal remedies.

(1) 42 R. R. 159 (8 Sim. 193; 1 Rail. Cas. 159).

(2) 82 R. R. 76 (7 Hare, 217).

During the progress of the argument on the questions of fact, further affidavits were filed, but were rejected by the COURT.

THE VICE-CHANCELLOR:

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I have felt great difficulty upon one question, which I always do when it is pressed upon me, that is, the rejection of affidavits. The consequence of doing so is, that I know I am deciding the case without having before me all the information which the parties think material. Certainly, according to my recollection of the practice when I was at the Bar, it was this: When a motion was brought on, and the opposite party applied for time to answer the affidavits, the usual course was to give time in the first instance, unless the case was said by the counsel on the other side to be one which could not brook delay; and then the practice of the VICE-CHANCELLOR OF ENGLAND was to hear the motion, and decide whether he would give the parties time to answer the affidavits, or, after he had heard them, whether he would give them leave to file affidavits in answer to the particular parts of the case which he thought pressed them. That was invariably the course pursued. If the practice be as I am now told,—that, until the plaintiff's case is over, the parties may go on filing affidavits,—it is impossible that justice can be administered. The argument on the other side is opened; the defect in the case is pointed out; the Court itself makes observations which lead the attention of the parties to what are or may be supposed to be the weak points in the case; and, before the counsel sits down, new affidavits are poured in, to which the other side have no opportunity of addressing themselves. One might even suppose a more extreme case to show that such cannot be the practice: the parties may keep back the most important affidavits purposely until the last moment. I was quite prepared *for the answer I received from two of the Judges to whom I [*86] addressed a question on this point. The answer was, that they always considered the Court had the discretion of allowing affidavits to be received at any time during the argument, which the Court required or demanded, but that it never was at the option of the parties to bring forward their affidavits in that way. Both of the learned Judges make use of the same expression: "That there must be a very special case for it." It amounts to no more than this: that the Court may, in this as in all other cases, regulate its own proceedings, and admit affidavits after the case is opened, if it should appear that the justice of the case requires it. I do not,

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however, think that in this case the result of the motion can depend upon the point to which the new affidavits are directed.

Now, with regard to the general question, I must confess that when the case was first opened I was strongly impressed against the application, and I will refer to one branch of the plaintiff's argument, because it enables me the better to state what my view is of the actual state of the case. It is said, that where one party, being the owner of an estate or of other property, makes a contract with another to do some work respecting that property,—to build a house upon it, for example, or to cut down and carry away timber, which timber is to remain the property of the owner after it is carried off a particular part of the estate,—that, if the owner of the property afterwards changes his mind, he may simply determine the contract; and, if the other party to the contract should insist upon going on to build the house, which would involve some damage to the inheritance, or should insist upon cutting down the trees, that this Court will restrain him by injunction at the application of the owner. At first I intimated a strong opinion *against that proposition in any sense whatever. It afterwards appeared to me (although I am not even now prepared to say the principle is a very clear one), that I could not say in the abstract such a case might not occur. I put this case to *Mr. Bird:* Suppose the owner of timber contracted with a party to cut down the timber for him, and carry it to the canal bank, that it might be transported to a place of sale, and that he was to do this within a month, and then receive 500*l.* for doing it; if, in that case, the owner of the timber were to say, "I have made up my mind not to cut the timber, but here is your 500*l.*," and the party who contracted to cut it down were to say, "I will not take the 500*l.* until I have done the work, and your timber shall come down," I do not think there would be much difficulty as to the principle upon which the Court might say, that the destruction should not take place. But if, as the case was put by *Mr. Bird*, the owner of the timber were to say, "You may bring an action against me, and the jury will give you so much out of the 500*l.*," or whatever the price of the work might be, "as the jury may think would be the profits to you, after deducting all the expenses of cutting and carrying the timber," I certainly cannot agree to the proposition that this would be a ground for the interference of this Court on behalf of the owner. A contract entitles the party to receive an ascertained sum for the entire work on a given day; but the proposal of the owner in such a case assumes

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that the contractor is only entitled to receive what the jury shall consider to be the profit,—a profit which the jury could not measure accurately, and a profit, not at the expiration of the time when the contract would or might in due course have been performed, but at the expiration of an indefinite time, when the case shall happen to be tried.

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The case stands thus: A person,—for I must not treat it as governed by any different rule because the plaintiffs happen to be a Railway Company, a Railway Company having no advantage in this respect over anybody else, their contracts with the parties who do the work not being matters provided for in the Acts of Parliament,—it is only the case of a person having property, over which he wants a railway for important purposes, contracting with some one to make the embankments, the excavations, and the tunnels, lay the rails, and do all the work for him, with a stipulation, that, if the contractor does not go on and complete it by a certain time, the employer may turn him out of possession of the property which is delivered to him for the purposes of the work.

If was said that the fact of turning the contractor out, had the effect of making any subsequent attempt by him to enter upon or deal with the property nothing more than a trespass, and that, in case of trespass, this Court will not interfere. In strictness, wherever a Railway Company empowered by an Act of Parliament to take land for the purposes of the railway, enters upon land which it is not authorised to go upon or take, that is a trespass, but still it is what the Court calls a trespass under the colour of right. The Company is not then professing to do anything more than the Act of Parliament empowers them to do, and the COURT has always said in those cases, where the mischief is irreparable, that it will interfere and confine the Company within the powers of their Act of Parliament. And although it is undoubtedly a trespass, still the COURT has most usefully and properly interfered to prevent the trespass in such cases. The Court treats the Company as not meaning to commit a trespass, but as asserting a right; and it simply enquires what the right *is under the power or contract. The Court allows the Company to do what they profess a desire to do,—that which the Act authorises, and nothing more. I may observe on this point, that I entirely agree with the observations made by another branch of the Court, in a case (1) cited before me in *Lady Davenport's*

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(1) *Haigh* v. *Jaggar* (1845) 70 R. R. 68 (2 Coll. 231).

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case (1). It is clear that the old rule as to interference in cases of trespass has been very much broken in upon in favour of parties in possession. I referred on this subject to a case (2) where some miners claimed a right, for the purpose of draining mines, to make a watercourse through a park, and a bill was filed to restrain it. The answer, I remember, to my great surprise when I read it, was simply an assertion that this, if anything, was a mere trespass, and that in that case the Court would not interfere. Neither the VICE-CHANCELLOR OF ENGLAND nor the LORD CHANCELLOR would hear of that argument, and the injunction was granted. They had no doubt about the principle.

Now, although this must be treated as a contract between two private individuals, it is a case in which each party asserts that he is merely doing that which the terms of his contract entitle him to do; and I do not know in principle why the Court has not a right to inquire into the question, whether either or which of the parties really is within the terms of his contract, if the case be in other respects a proper one for such inquiry. In order in this case to try the principle, I must of course assume that there has been so clearly or probably a violation of the contract on the part of the defendant, and a right on the part of the Company to resume possession and finish their works, that I shall be safe in acting upon that supposition.

[90] The first question therefore is, whether the parties are or are not exceeding that which they have a right by their contract to do; and if that state of things be supposed to exist, the question comes to this,—Is it a fit case for the interference of a court of equity?

In order to determine whether the Court should interfere, I am first to inquire what is the nature of the mischief which will follow from not interfering. Now, both parties have a great deal to say, and I think very reasonably, upon that point. I quite agree with the argument for the Company, (and I do not think it has been attempted to be controverted,) that irreparable mischief will be done to the Company,—irreparable in the sense in which the Court uses the term,—that it is quite impossible that the Court or a jury could ever measure the damage to the Company from the railroad being shut up for a time, owing to its not being in a proper state for working. You may say that the Company could carry so many hundred passengers a day at such a rate, but they might not have had

(1) *Davenport* v. *Davenport*. 82 R. R. (2) Cited 82 R. R. 79 (7 Hare, 223). 76 (7 Hare, 217).

those passengers to carry. The diversion of the traffic to another line, or various accidents, might deprive them of the profit. Any calculation of the amount must be merely speculative. That was the view which I took of the case of *Rigby* v. *The Great Western Railway Company* (1). If in this case it were confessed that Hattersley had placed himself in such a position that the Company ought to be allowed to put the line in a proper state, I think the mischief that would follow the interruption of that right would bring the case within the ordinary rule, care being taken that in interfering the Court puts the case in a proper course for trial. The question then is, What is to be done in the interim? Now, in the interim I *must take care not to destroy the right of either party. The [*91] defendant has quite as much right to claim the exercise of this care as the plaintiffs have. I confess, if I am simply to stop the defendant from going on with the line, and it should afterwards turn out that I am wrong in granting the injunction, (and I am supposing now that I have granted it, and prevented him from going on [with] the line), I do not see how it is possible for me ever to give him any but a speculative compensation. As the case now stands, a certain quantity of work has been done, and certain works remain to be done, and to be paid for at a certain rate. The fact to be ascertained is, what profit that would be to the defendant. The profit to the defendant depends upon his activity and skill in executing those works. The jury can no more be sure of doing justice to the defendant by giving him the profit which the contractors who shall be employed, if it be left to the Company, would make, than they can be of accurately measuring one man's skill by the skill of another. Therefore, although an approximation may perhaps be made, it is a very different thing from what the defendant would get by performing the work in specie. There may, perhaps, be great difficulty in framing an order which shall preserve the rights of the defendant, and yet stop him from the specific execution of the work. That difficulty, however, if it be one in this case, has been got over by the defendant, who says that he is willing to have an inquiry as to whether any profits might come to him in respect of the branch line, supposing it not to be executed by himself. I cannot, as I have said, except in specie, give him precisely what he is entitled to; but I have no doubt an approximation may be made so near as to make it more for the advantage of the defendant to take that which I am about to mention *than to [*92]

(1) 78 R. R. 12 (2 Ph. 44).

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decline it for the sake of approaching near to the exact profit, in case of his succeeding upon the question now before me.

The difficulty of the defendant is this,—that the terms of the contract (no doubt very arbitrary, which, perhaps, may be necessary in these cases) are, that the defendant shall be entitled to be paid nothing until he has procured the certificate of the engineer. That certificate he has not obtained; and therefore, under the terms of the contract, he cannot strictly recover at law. The courts of law, however, I am told, have got over that difficulty. If the certificates have not been granted, but the engineer of the Company in point of fact has allowed the contractors to go on doing the work, —work of which the Company have taken the benefit,—the courts of law, I am told, have in many cases said, that, if the contractor, instead of proceeding under the contract, (in which case the certificates are necessary), brings an action for work and labour done for the use of the Company, he is entitled to recover for the work done, at the measure and value according to the prices specified in the contract. This, of course, has been in cases where nothing appears to have been really wanting, except a compliance with the form of the contract. Whether this case would fall within that rule, I do not know.

If in this case the jury should find the contractors had not complied with the terms of the notice, and had not, after the 9th of March, 1849, efficiently supplied the defects complained of, and by this default or omission had entitled the Company to the benefit of
[*93] their notice, it might follow that, according to the terms of *the contract, the defendant may be entitled to nothing but what he has actually received.

What I should propose to direct is this: the Company come to me and ask for an injunction, to assist them in protecting their property, in a case in which, if they are right as to the effect of their notice, the defendant may be entitled to receive nothing more than he has already received, which may be much less than the value of the work he has done. If this be the way in which the case stands, there may be a forfeiture of the rest of the payments to which the defendant would otherwise be entitled. But if I direct an account to be taken of all the works which have been done by the defendant, and what is the value of that work in money, at the prices specified in the contract, so far as the prices are specified, and what is the value of such works which they have done, where the prices are not specified in the contract, the result would be to give him

payment in full, and the forfeiture would be avoided. If that, which is here called forfeiture, be in truth a forfeiture,—if it be regarded in the nature of those forfeitures the advantage of which the Court requires every party to waive when he comes into this Court,—there is no doubt the Court may impose any terms upon the Company with regard to it. The stipulation, which is called a forfeiture in this case, is included within the terms of the contract. It may be a very hard contract, but it is within the terms of the contract, and may be necessary to protect the employers in works of this magnitude.

The only difficulty which I feel in dealing with the case is on the point as to compensation for delay. If *the defendant thinks [*94] that point so material that he cannot waive it, then I must consider how far I can make an order, and what that order should be, taking care not to deprive either party of the benefit they are entitled to, if in the event it turns out the party in whose favour I now make an order shall be in the wrong.

THE VICE-CHANCELLOR: *July 4.*

It is necessary that the case should be distinguished with reference to the works which have been done, and the works that remain to be done.

With reference to those that have been done, the plaintiffs have submitted, and I think properly, as well as necessarily, to this,—that if they are to have the help of this Court, they must pay for the works which in point of fact they get the benefit of. But with respect to the works which remain to be done, if the plaintiffs are right in saying that they might by law have resumed possession,—I use the word "possession" in a technical sense,—that they might have resumed the works, and finished them themselves, the defendant cannot in that case ask me to make the plaintiffs pay for work he has not done. I have therefore framed the minutes with a view to those two divisions of the case. By the order which I propose to make, the defendant is to give up possession of both the main and branch lines, and will be restrained from interfering, according to the words of the injunction prayed. That will have the effect of putting the Company into entire possession of the railway,—and then upon the terms of paying for the work done, and the future works, if there has been no forfeiture,—they in fact to that extent get all they ask for. The Master may then take an account of what, if anything, *remains due to the defendant for works [*95]

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done or materials found at the contract prices, whether certified or not.

It is then necessary to decide whether the Company have lawfully obtained that final possession which this order gives them. An issue is in some respects the better way of trying this question; but in strictness I have no right to direct an issue which involves a question of law, unless it be a case in which there is no possibility of avoiding it. It was done by Lord ELDON in *The Glamorganshire Canal* case (1), and by myself in *Dawson* v. *Paver* (2), which the LORD CHANCELLOR afterwards affirmed. But, except in cases of this kind, the Court has always objected to direct issues which involve a point of law. I hardly know why there should be the objection, for it is only trying an action for the assistance of the Judge. The other alternative would be to direct the plaintiffs to proceed to the trial of such action as they may be advised to bring, for the purpose of asserting their right, on the 31st of March, 1849, to take possession of the works,—the defendant admitting that he held and retained the possession against the Company.

July 6.

The case was spoken to, on the form of the order.

The plaintiffs, by their counsel, submitting to account as this Court may direct, and the defendant, by his counsel, waiving all claim to compensation for delay, alleged to have been occasioned by the plaintiffs, in the execution of the works, in &c., done or to be done, this Court doth order &c., that an injunction be awarded to restrain the defendant, his servants, and workmen, from retaining possession of or entering upon, or interfering with &c., (pursuing *the terms of the motion and prayer) until the further order of this Court; but the defendant and his witnesses are to be at liberty at all reasonable times to go on the said lines and works, for the purpose of giving evidence relating thereto upon the trial of the issue hereinafter directed. And it is ordered, that it be referred to the Master, &c., to take an account of what, if anything, is due to the defendant, (as surviving his brother or on his own behalf,) in respect of any works done or materials found by the defendant and his deceased brother, or either of them, for the plaintiffs, on constructing or maintaining the said main line and branch line; and in taking such account, the Master is not to inquire whether works done, have been certified by the Company's engineer or not, or whether the work was completed within the time limited by the

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(1) 36 R. R. 289 (1 My. & K. 154). (2) 71 R. R. 155 (5 Hare, 422).

contract. And it is ordered, that the Master, in taking the said account, do have regard to the provisions of the contract, as to the price, and as to the materials to be found by either party, so far as the same be applicable. Liberty to state special circumstances relating to the matters aforesaid; and for the better taking, &c., just allowances. And this Court being desirous to have the following question of fact decided by a jury, viz. whether on the 31st of March last, the plaintiffs, to the damage and injury of the defendant, prevented the defendant from completing the contract dated the 22nd day of December, 1846, in &c., and employed their own workmen to complete the same: It is ordered, that a writ of summons be issued out of &c. by the defendant against the Company, pursuant to the Act 8 & 9 Vict. c. 109. Direction to proceed to trial at the next Assizes at Liverpool. Upon such trial, the Company to admit that, on the 31st of March, they did in fact prevent the defendant from completing the contract, and did employ their own workmen to complete the same. Order to produce &c. And this Court doth reserve the question, whether the defendant is entitled to any compensation in respect of the loss of profits in not executing the parts of the branch railway not executed; and this Court doth reserve all further directions, and the costs of this application, until after the said trial, and the said Master shall have made his report. Liberty to apply. Order to be without prejudice to the right of either party to appeal.—Reg. Lib., 1923. 6th July, 1849.

O'REILLY *v.* ALDERSON (1).

(8 Hare, 101—105.)

1849.
May 22, 25.
June 2.

WIGRAM, V.-C.
[101]

Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased.

Although taking up his permanent residence abroad in such a case does not *ipso facto* deprive a trustee of his office, yet it is such a disqualification as entitles the cestuis que trust to have a new trustee appointed in his place.

It is the duty of trustees, having power to appoint new trustees, to make an appointment impartially, as between their cestuis que trust, and not without communication with them.

UNDER a settlement, dated the 1st of November, 1833, a sum of 1,378*l.*, New 3½ per cent. stock, was transferred into the names of

(1) *In re Bignold's Settlement Trusts* (1872) L. R. 7 Ch. 223, 41 L. J. Ch. 235, 26 L. T. 176; *In re Earl of Stamford* [1896] 1 Ch. 288, 296, 65 L. J. Ch. 134, 73 L. T. 559.

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Alderson and Morphett, upon trust for Ann the wife of Richard Payne, for her separate use, for her life; and after her decease, for Richard Payne the husband, for his life; and after the decease of Richard Payne and Ann his wife, upon trust, if there should be no children of that marriage, for Martha O'Reilly Cross, and if there should be any children of the marriage, then in trust for Martha O'Reilly Cross and such children as Ann the wife should appoint, and in equal shares in default of appointment. The deed provided, that if Alderson and Morphett, or either of them, or any future trustee or trustees to be appointed as thereinafter mentioned, should happen to die, or go to reside abroad, or be desirous of being discharged of and from, or refuse or decline to act or become incapable of acting in, the trusts thereby in them respectively reposed, before the said trusts should be fully performed or discharged, then and in such case, and when and so often as the same should happen, it should be lawful to and for the surviving and continuing trustee, or if there should not be any trustee, then to and for the executors and administrators of the last surviving trustee, by any writing or writings, executed as therein mentioned, to nominate, substitute, or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or going to reside abroad, or desiring to be discharged, or refusing or declining to act, or becoming incapable of acting as aforesaid.

There were no children of the marriage, and Ann the wife died, [*102] leaving her husband surviving. Morphett, one *of the trustees, died in December, 1848, and Alderson, the other trustee, resided in France. The plaintiff was a purchaser of the reversionary interest of Martha O'Reilly Cross, and the plaintiff's solicitor, soon after the death of Morphett, forwarded to Alderson a deed for the appointment of Brady as a new trustee; and the solicitor of Payne, the tenant for life, being also in communication with Alderson, prepared a deed for the appointment of Freeman as a new trustee, and which latter deed Alderson executed. The plaintiff, on becoming aware of this appointment, placed a *distringas* on the stock. Alderson being thus prevented from transferring the fund into the names of himself and Freeman, the solicitor for Payne and Alderson gave notice to remove the *distringas*, and the bill was thereupon filed to restrain the transfer.

The *Solicitor-General* and *Mr. Rogers* for the motion.

Mr. Wood and *Mr. J. H. Palmer, contrà :*

The questions argued were: First, whether the power of appointment of new trustees could be executed by Alderson, after he had taken up his residence abroad; secondly, whether such residence abroad did not incapacitate him from continuing a trustee, and therefore form a ground for taking the fund out of his control; and lastly, whether his conduct in appointing a new trustee without communicating his intention of doing so to the plaintiff, and in attempting to remove the *distringas*, was not improper, and a ground for taking the fund out of his power.

THE VICE-CHANCELLOR:

Each party in this case appears to have done his utmost to put himself as far as was possible in the wrong, without doing that which the Court would act upon as being illegal. Alderson, the surviving trustee of the stock, appears *for nearly six years before, [*103] and at the time of the death of Morphett, his co-trustee, to have had, and he still has, his permanent residence at Calais. In this state of things, the right of the plaintiff to have a new trustee is not to be disputed. But what was the proper course? Surely to communicate with the defendant; or, if he thought right to apply to Alderson, he should have made known to him his own wishes, and requested him to make the necessary communications to Payne, the tenant for life. But instead of this, he selects Brady as a trustee for himself, and requests Alderson to execute a deed prepared by his solicitor, appointing Brady as such trustee,—the letters of his solicitor to Alderson being calculated to impress Alderson's mind with the idea that he was acting for the defendant as well as for the plaintiff, whilst in truth all was behind the back of the defendant; and nothing could well be more improper.

Alderson, however, did not execute the deed; but came from Calais, and (as I understand) discovered that the letters of the plaintiff's solicitor had been *ex parte* as regarded Payne. But, unless the conduct previously pursued by the plaintiff could justify it, a course of conduct, not much less objectionable, is pursued on the part of Payne. Without any communication to the plaintiff, either that Brady would not be appointed, or that another person (Freeman) is to be appointed, Alderson, at the suggestion of Payne, appoints Freeman, and proceeds to the Bank to transfer the stock into the joint names of Alderson and Freeman; a transfer which is prevented only by the *distringas*. Now, without saying that the

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appointment of Freeman is invalid, by reason of this *ex parte* proceeding, I feel it a duty to declare that the appointment of Freeman, *ex parte*, was most objectionable. The tenant for life and remainderman being both adult, why is a trustee to act *ex parte* in a point so important as *the appointment of a trustee of their property? I know I correctly state the practice of professional men when I say that this is not the course usual in such cases. I am sure it is not that even course which a trustee ought to hold between his cestui que trusts, and I am equally sure that it is a most indiscreet course as regards his own indemnity. The proposition that the previous conduct, on the part of the plaintiff, justified the defendant, Payne, is inadmissible. The consequences, now before me, supersede the necessity of any further comment. An expensive motion has been occasioned upon a point involving no question of right, which a little temper and discretion would certainly have settled.

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Upon the merits, I think that Alderson had power to appoint a new trustee in the room of Morphett, notwithstanding his permanent residence at Calais; and the only question, possibly, might be this: whether, if Alderson chose to appoint Freeman, a person to whom the plaintiff objects, behind the back of the plaintiff, knowing that the plaintiff desired to be consulted as to the appointment of the trustee; whether, in that case, the plaintiff is not entitled to require Alderson to justify the appointment? But I will assume the appointment to be unobjectionable. The question then will be —whether, if the fund should be transferred into the joint names of Alderson and Freeman, it will be in that state in which it ought to be under the trusts of the settlement; the plaintiff, one of the cestui que trusts, objecting to it? This makes the objection depend not upon the appointment of Freeman, but upon the stock continuing in the name of Alderson, solely or jointly with another, when his permanent residence is admitted to be in foreign parts. Now I confess that circumstance appears to me to place Alderson, *primâ facie*, under a disqualification for the office of trustee; not such a disqualification as, *ipso facto*, makes him not a trustee, but *such a disqualification as, *primâ facie*, entitles any cestui que trust to require that the office should be filled by another trustee. It was said that the appointment of a new trustee, in such a case, was not compulsory upon any one, but discretionary. To that observation, in the case of a trustee taking up his residence permanently abroad, I am not prepared to accede. I do not say that a case might not exist in which a trustee might not properly refuse to

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appoint a new trustee, only because a trustee had gone abroad; but, in the case of permanent residence abroad, I think that if a trustee, having power to appoint another in his place, should refuse to exercise that power, the Court would control his discretion. If Freeman should die in the lifetime of Alderson, the trust will again be exposed to the inconvenience of an absent trustee; a case which I observed, at the time of the argument, is *omissus;* I may suppose, also, the case of incapacity from lunacy or other causes.

I think that, pending the suit, the position of the stock ought not to be altered, by placing it in a state in which it ought not to be; and that the injunction, therefore, ought to be granted to restrain the transfer until the hearing of the cause, or further order.

The cause was afterwards heard, and the fund transferred into Court.

ATTORNEY-GENERAL *v.* THOMPSON (1).

1849. *Jan.* 25, 29, 31.

(8 Hare, 106—120.)

WIGRAM, V.-C. [106]

Where the respective titles alleged by the plaintiff and defendant were antagonistic, the plaintiff claiming the reversion in lands alleged to be in the possession of the defendant as lessee, and the defendant claiming to be entitled in fee to the lands, but admitting that he derived his title under a person alleged by the plaintiff to have been lessee only, and that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, corresponded with the parcels described in the demise to the alleged lessee, it was held that the plaintiff was entitled to a discovery of the parcels, and to a production of so much of the purchase deed as described them.

A plaintiff is not entitled to discovery of documents, the right to the possession or inspection of which is not necessary to the proof, and is only consequential upon the existence of the title he claims, that title not being admitted, but where the Court finds upon the answer, that, although the title of the plaintiff is not admitted, the question as to the existence of that title is a question to be tried, the plaintiff is entitled to the discovery and production of particulars material to establish his case on the trial.

Considerations of the limits of the right to discovery, in cases of adverse title, of the deeds and evidences in the possession of the defendant.

THE original information stated an indenture of feoffment of the 1st of October, 1735, made by Evan Treharn, of his part or share of the farm and lands called Penydarren, otherwise Ton-y-fald, containing the several closes therein named, to and to the use of John Williams, his heirs and assigns, and a lease, dated the 2nd of October, 1735, made by John Williams, of the same premises, for a

(1) *Budder* v. *Wilkinson* [1893] 2 Q. B. 432, 63 L. J. Q. B. 32, 69 L. T. 427.

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term of nine hundred and ninety-nine years, to the said Evan Treharn, reserving an annual rent of 3*l*. The information then stated a devise by the will of John Williams, dated the 18th of November, 1735, of his undivided moiety of the farm and lands called Penydarren, otherwise Ton-y-fald, containing the several closes therein named, subject to the said lease, to trustees, upon trust for the Protestant Dissenters of Merthyr Tydvil; and that, in 1784, the person entitled to the residue of the term joined with the owner of the other moiety of the premises in demising the entirety for some long term for mining purposes; that the defendants, Thompson and Forman, had come into possession of the premises under such demise of 1784; that the said defendants, or those under whom they claimed, had procured to themselves an assignment of the residue of the said term of nine hundred and ninety-nine years in one moiety, and a conveyance of the

[*107] *other moiety: that the defendants had worked the mines under the lands contained in the demise of nine hundred and ninety-nine years, and had taken large quantities of minerals and ore therefrom; and the information prayed an injunction and account.

The defendants by their answer stated an indenture of feoffment of the 4th of June, 1728, whereby a moiety of Tyr Ton-y-fald (containing the parcels therein described) was conveyed to Evan Treharn, his heirs and assigns; but the defendants added, "that the parcels comprised and described in the said feoffment of the 4th of June, 1728, do not correspond either in quantity or description with the parcels comprised in the indenture of feoffment of the 1st of October, 1735, in the said information set forth, as the same are therein described and set forth, although some of such last-mentioned parcels are the same in description but not in quantity as some of the parcels in the said indenture of feoffment of the 4th of June, 1728. But the defendants say, they have never seen the indenture of feoffment of the 1st of October, 1735, or the indenture of lease of the 2nd of October, 1735, in the said information set forth, nor is any mention or allusion whatever made to either of such last-mentioned instruments in the abstract of title, or in any of the deeds which were furnished to the parties under whom these defendants now claim to be entitled in fee-simple to one moiety of the hereditaments and premises comprised in the said feoffment of the 4th of June, 1728, upon their purchase thereof in the year 1801, as after mentioned; nor had these defendants any reason to believe or suspect, nor did they believe or

suspect, or ever hear till the year 1842, that there were such deeds as the feoffment of the 1st of October, 1735, and the indenture of lease of the 2nd of October, 1735, in the said information mentioned."

The defendants stated certain mortgage deeds made by the heir-at-law of Evan Treharn in 1775, purporting to convey the premises in fee without any mention of the alleged deeds of 1735; and they also stated several demises of the undivided moieties of the said premises by such heir-at-law, and by the owner of the other moiety in 1784, with power to work the mines, to persons who formed a partnership called the Penydarren Iron Company, and which partnership afterwards purchased the fee-simple of a moiety of Ton-y-fald, which was duly conveyed to them by indentures of lease and release dated the 20th and 21st of November, 1801, "by the same description of premises as the hereinbefore stated description of the premises comprised in the said deed of feoffment of the 4th of June, 1728 (subject to the said lease of 1784), and save and except a lease of 1796, to the same partnership;" and also, "save and except a yearly rent of 3*l.* issuing out of the said moiety of the premises due to the trustees for the time being of Yrusgorgy Meeting-house in Merthyr Tydvil." The defendants said, they believed that the payment of such 3*l.* had not been made by the heirs of Evan Treharn in respect of the rent reserved by the alleged lease of the 2nd of October, 1735; and that the deeds of 1801 first subjected the premises to the said payment: they admitted the payment of the 3*l.* annually since 1801. The defendants, among other things, stated, that it would appear from the leases and documents in their possession, that some part of such land was divided, and the other undivided. The defendants claimed both moieties of the land in their possession under the demise of 1784; and under the said conveyance of November, 1801, they claimed the fee simple of the moiety formerly belonging to Evan Treharn, and they claimed to work the mines under such title. They denied that the alleged term of nine hundred and ninety-nine years had ever been assigned to them, or any person under *whom they claimed; and they admitted the possession of the deeds of the 20th and 21st of November, 1801.

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The information was then amended, by charging that the defendants claimed under the alleged conveyance of the 20th and 21st of November, 1801; but that if any such conveyance was ever made, the lands to which the same applied were not in fact the

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lands comprised in the indentures of the 1st and 2nd of October, 1735, and so it would appear if the defendants would set forth the full particulars and quantities of the lands as contained in the said alleged indentures of the 20th and 21st days of November, 1801.

The information charged that divers parcels of the lands which the said defendants admitted to be in their possession and occupation, differed in quantity and description from, and were not identical with, the lands and premises contained in or intended to be conveyed by the said indentures of the 20th and 21st days of November, 1801; and that the said defendants were, in fact, in the possession and occupation of the lands contained in the said indentures of the 1st and 2nd days of October, 1735, as well as of the lands alleged by them as aforesaid to have been conveyed by the said indentures of the 20th and 21st days of November, 1801.

The answer to the amended information denied that the defendants claimed the lands mentioned in the information under the deeds of November, 1801, save as their former answer had stated; and they insisted, that, under the circumstances, and for the occasions herein and in such answer in that behalf set forth (to which they also craved leave to refer), they ought not to be compelled, and they therefore declined to set forth fully and at large the description and quantities of the parcels of the lands and [*110] *premises which the said indentures of the 20th and 21st days of November, 1801, purport "and effect" to convey. For they said (as they alleged the fact and truth was,) that the aforesaid indentures of the 20th and 21st days of November, 1801, were their own title deeds, and exclusively related to their own title to the lands and premises of which they were in possession, as in their said former answer mentioned; and did not, as they believed, form any part of the title of the charity in the said information mentioned to the premises comprised therein, and did not, as they believed, prove or tend to prove any of the allegations in the said amended information mentioned, any further or otherwise than as such allegations or any of them were or might be therein and in their former answer admitted to be true. And the defendants denied it to be true, that any part or parts of the lands and premises in their possession or occupation did to any extent differ in quantities or description from, or were or was in any respects in fact not identical with, the lands and premises described in the said indentures of the 20th and 21st days of November, 1801, and thereby purported to be conveyed.

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On the motion for the production of the papers referred to in the schedule to the answer, the defendants resisted the production of their purchase deeds of the 20th and 21st of November, 1801.

The *Solicitor-General* and *Mr. Blunt* for the motion:

The admission of the relevancy of the documents is sufficient to entitle the informant to their production, unless the effect of that admission is taken away by showing a sufficient ground of protection. The assertion that the documents are evidences of the defendants' title, and that the defendants believe that they will not support that of the plaintiffs, is not alone a protection: *Harris* v. *Harris* (1). The Court will judge of their effect when the documents are produced. In this case the right of the plaintiffs to production is strengthened by the admission in the answer, that the parcels described in the several deeds do to some extent at least correspond.

[111]

Mr. Walker and *Mr. Collins*, for the defendants, contended, that there was no ground upon which the Court would order the production of the title deeds of the defendants. The parties did not claim under any common title. There was no identity shown to exist between the lands, the reversion of which was claimed by the information, and the lands in the possession of the defendants. The name of Evan Treharn, indeed, occurred in both titles, but it was mentioned as dealing with a different subject. A rent of 3*l.* occurred in both titles; but the rent on the property to which the information referred was an incident of the reversion—the rent on the property of the defendants was a rent-charge. This, in fact, was the case made by the information. The amended information charged that the lands comprised in the deeds of 1801, and those in the deeds of 1735, were not the same. The case, therefore, stood thus: the charity claimed some estate of which, they said, the defendants were in possession; and they said the defendants have deeds which relate to other lands, and ask that they may be ordered to produce the deeds, not relating to the lands which they claim, but to other lands as to which they did not dispute the defendants' title. The application was to this extent unprecedented. If the informant might have been entitled to the production on the original information (which, in a case of adverse title, was denied,) any pretence for such production was excluded by the amendment.

(1) 67 R. R. 37 (4 Hare, 179).

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THE VICE-CHANCELLOR:

[112] There is no doubt as to the principle by which this case must be governed. It is found in all the authorities, one of the last of which is the case of *Glover* v. *Hall* (1). The plaintiff must show that he has an interest in the document, the production of which he seeks. What is the meaning of the term "interest thus applied"? It is not interest in the nature of property. If the right were so limited, the production would be very rarely obtained. It is sufficient that he be so far interested in the document as to stand in need of its production for the legitimate purposes of the litigation in which he is engaged with the defendant,—for the purposes of the suit. He must show that it is, or may be, evidence which may prove, or lead to or assist in proving, his case at the hearing of the cause; and this interest he must make out from the answer of the defendant. It must be shown that the document is of a character that it will or may give a discovery of the case or a portion of the case without proof of which the plaintiff cannot have a decree. The claim on behalf of the charity is to the rent of 3*l.* a-year, under the lease by Williams to Treharn. The defendants claim to hold the land under a conveyance from Treharn or persons claiming under him. Applying to that state of things the rule laid down in *Bolton* v. *Corporation of Liverpool* (2) it is clear that none of the deeds in the possession of the defendants can prove the title of the charity to the rent under the demise to Treharn. No case, at least, is alleged to show that any such evidence can be found in the defendants' deeds. There are, however, two things to be proved in support of the information: first, that under the demise of Williams, the charity is entitled to the 3*l.* a-year; and secondly, that the defendants are in the possession of the lands out of which [*113] the 3*l.* a-year is to arise. If the deeds of 1801, under which *the defendants say they have purchased the lands in their possession, will show the identity of the lands, they will prove one of the branches of the case, which, in support of the information, it is necessary to establish. The defendants, it is true, deny the right of the charity to the 3*l.* a-year which is claimed, but that may be proved by other means; and I cannot, because that part of the case is at present not proved or admitted, refuse the plaintiff the discovery which he asks, to enable him to make out the other part of his case. It is not like the case of *Adams* v. *Fisher* (3), in

(1) 78 R. R. 152 (2 Ph. 484—492).
(2) 36 R. R. 251 (1 My. & K. 88).
(3) 45 R. R. 328 (3 My. & Cr. 526).

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which the LORD CHANCELLOR held that the plaintiff must show a title to the account, before he was entitled to a production of documents relating to the items of the account; nor is it like the case of *Dubless* v. *Flint* (1), in which a motion to bring into Court money admitted by the defendant to be in his hands was refused, there being no admission of the plaintiff's title. The circumstance that the defendants ignore the title of the charity is not a reason for refusing to discover whether the lands comprised in their deeds are the lands out of which the rent which the charity claims is to issue.

The defendants then allege that the deeds of 1801 are their own title deeds; but this is not a ground for refusing the production, so far as they may be necessary to establish the title alleged by the plaintiff. In many cases in which a bill is filed to impeach a deed under which the defendant claims, the plaintiff is entitled to move for the production of the deed. This has been done in cases where it has been alleged that something appears on the face of the deed itself, which would tend to prove the case of the plaintiff: *Kennedy* v. *Green* (2). But it has not been confined to such cases. Applications were made for the production of instruments forming the title of the *defendants in the cases of *Beckford* [*114] v. *Wildman* (3), *Tyler* v. *Drayton* (4), *Balch* v. *Symes* (5), *Fencott* v. *Clarke* (6), *Neate* v. *Latimer* (7), *Pilkington* v. *Himsworth* (8), and *Carter* v. *Goetze* (9); and in all these cases I believe the production was ordered. The Court has not been precluded from making the order by the mere denial of the plaintiff's title, but has gone into the inquiry,—whether it did not appear by the answer that there was a question to be tried, upon which question the documents might furnish evidence on behalf of the plaintiff. There are certainly cases in which title-deeds are spoken of as if they were the subjects of a particular privilege, but I do not think that it has ever been decided that a ground must be laid for their production which does not apply to other documents.

THE VICE-CHANCELLOR:

In this case I shall not recur at large to the points I observed upon at the close of the argument, relating to the principle by

(1) 4 My. & Cr. 502.
(2) 38 R. R. 69 (6 Sim. 6).
(3) 16 Ves. 438.
(4) 2 Sim. & St. 309.
(5) 23 R. R. 195 (T. & R. 87).
(6) 6 Sim. 8.
(7) 47 R. R. 413 (4 Cl. & Fin. 570).
(8) 1 Y. & C. 617.
(9) 2 Keen, 581.

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which my judgment must be guided. To one point only I think it right to recur, I mean the distinction between cases of the class now before me, and cases such as *Dubless* v. *Flint* (1), and *Adams* v. *Fisher* (2), and other like cases in which the COURT has said, that as the plaintiff's title was not admitted, the Court would not before the hearing make an order against the defendant, to which order the plaintiff would not be entitled unless he had the title which he asserted. The object of the motion in this case is to obtain evidence (by means of discovery), by which evidence the plaintiff's title is to be *proved at the hearing. To refuse a discovery because his title is not admitted, would be to refuse it in the case in which it is wanted, and for which the rule of the Court giving discovery to the plaintiff intended to provide. In *Adams* v. *Fisher*, the plaintiff alleged that the defendant was an accounting party to the plaintiff's testator, in respect to his employment by the testator; and the plaintiff moved for the production of documents in the defendant's possession, relating to matters of the alleged employment. The defendant denied his employment by the testator, and his liability to account to the testator's estate,—he said that the person who employed him, and to whom alone he was accountable, was a third person, A. B.,—who was the testator's agent, and was accountable to his estate; and the LORD CHANCELLOR decided, that until the privity between the defendant and the testator's estate was established, it was premature to call for a production of documents, which related exclusively to the items of the account. The same reasoning would not apply, if, as in *Harris* v. *Harris* (3), (cited at the Bar), the contents of the documents had related to the fundamental point in the plaintiff's case, namely, his right to call for an account.

[*115]

The only inconvenience which the decision in *Adams* v. *Fisher* would occasion to the plaintiff, was some possible delay (see *Rowe* v. *Teed* (4), and the possible loss of evidence by the death of the defendant)—an observation which applies less strongly to the production of documents than to the answer of a defendant upon exceptions in the common form. And therefore it was that I said during the argument, than an unnecessary difficulty had been created on the part of the plaintiff, by moving for the production of the deed of 1801, instead of requiring the defendants, by exceptions to their answer, to set out the descriptions of the parcels contained in that deed.

(1) 4 My. & Cr. 502.
(2) 45 R. R. 328 (3 My. & Cr. 526).
(3) 67 R. R. 37 (4 Hare, 179).
(4) 15 Ves. 372.

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It was said indeed, that a motion for the production of documents in a case like the present, is analogous in principle to exceptions to an answer, as being the process of the Court for compelling the defendant to perfect his answer. This in some sense may be true, and ample authority for the position may be found in Lord ELDON'S judgments; but the Court (and with good practical reasons on its side) will in many cases compel a defendant to answer direct questions, the answer to which the Court may be less ready to allow a plaintiff to seek by ransacking the papers of his opponent.

I have read the pleadings in this case, and I believe I state the case with sufficient accuracy for the present purpose, by saying that the *Attorney-General*, by the original and amended information, represents the charity to be entitled in fee simple, under the will of John Williams, to an undivided moiety of the lands of Penydarren, otherwise Ton-y-fald, subject to a term of nine hundred and ninety-nine years, under a lease dated the 2nd of October, 1735; upon which lease was reserved an annual rent of 3*l*. The information treats the defendants as in lawful possession of the property derivatively under the lease of the 2nd of October, 1735, and complains of their working the mines, which, as lessees for years, they could not lawfully do, and asks relief accordingly. The defendants ignore the plaintiff's case altogether, and claim to be entitled to the entirety of the property of which they are in possession under two different titles, applicable to the two different moieties of the entire estate. The title to one moiety commences in 1728, in a conveyance to Evan Treharn, in fee, of one moiety of Penydarren, otherwise Ton-y-fald. In November, 1801, the defendants, or those under whom they claim, purchased of parties claiming under Evan Treharn one moiety of Penydarren, otherwise Ton-y-fald, *subject to an annual payment of 3*l*., issuing out of the moiety [*117] thereby bargained and sold, due to the trustees, for the time being, of a certain meeting-house in Merthyr Tydvil. They say that the number of closes, and the quantity of land, a moiety of which they purchased, do not correspond with those stated in the information to be contained in a certain deed of feoffment of the 1st of October, 1735, which is the root of the title of Williams, the plaintiff's testator; but they admit a correspondence, or similarity between some of the parcels in the deeds of 1728 and 1735, as the latter are stated in the information. They say the deed of November, 1801, is their title deed; that it shows their title, and not that of the plaintiff, and that they are not bound to produce it. The other

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moiety was purchased by the defendants under one Richards in 1784, but no question upon this arose. All that is now asked by the motion is, a production of the deed of November, 1801.

A question arose upon the amendments, which I will presently notice. At present I will suppose that no difference has been made in the question by the amendments, or the answer to them.

The defendants are, *primâ facie*, right in their argument. Their title deeds cannot, in a case like this, help to prove the plaintiff's case. In fact they are antagonistic. A main question, and one most prominent upon the pleadings, is the identity of parcels, and that the plaintiff will be bound to prove at the hearing, and is, therefore, *primâ facie*, entitled to discovery from the defendants, not including the conveyance of 1801, if that will prove the identity of the parcels. The plaintiff may be able to prove the deed of October, 1735, and the will of Williams; but that will not entitle him to a decree at the hearing without proof as to the identity; [*118] *and that which is necessary to perfect his right to a decree, he is entitled to now in the form of discovery.

Admitting, then, the validity of the defendants' objection in the first instance, the question is, whether the admissions, in the answer, do not show that the plaintiff has an interest in the deed for the purpose I have referred to? I think that the answer must be given in the affirmative. The persons under whom both parties claim (the Treharns); the general name of the property, Peny-darren, otherwise Ton-y-fald; the division of that into moieties; the correspondence, or similarity of the names in some of the parcels, and the 3*l.* per annum, applicable to each, appear to me conclusively to show that the contents of that document must be material as evidence with respect to the identity of the parcels.

But it was argued, that the bill had been amended since the answer, and that the admissions in the answer to the original bill were not to be taken as answers to the matters in the amended bill. I will not deny that a case might well arise, indeed I have known several, in which it would be unjust to treat an answer to an original bill as an admission of matter contained in an amended bill. One remarkable case occurred in this Court, where the bill was amended, making no alteration, except in the dates of certain deeds. The answer to the original bill was the admission of the existence of the documents in the bill mentioned, which, of course, was not to be taken as an admission in the case of the amended bill. The case, as I have said, may occur, but I have not been

able to discover any such case in these pleadings. The defendants have raised no such point by their answer, nor has it been argued that anything which appears on that answer to the amended bill, alters the question now before me.

But it was further said, and this struck me very much at the [119] time, that the grounds upon which I have intimated that the motion might succeed were excluded by the amendments. My argument being, that the deed of 1801 might prove the identity of the parcels in the deed of the 1st of October, 1735, with those in the possession of the defendants, whereas it was said that the amended information expressly charges that the parcels in the deed of November, 1801, are not the same with those in the deed of October, 1735. I cannot understand why the plaintiff should have embarrassed the case by introducing the amendment which has given rise to this argument. But, without deciding what the effect of that amendment is, I think, adverting to the object and frame of the information, that the amended charge does not raise a material issue in the cause. The issue is, whether the parcels are identical, and not whether they appear to be so by the deeds of 1801, or any other deed in particular. If at the hearing of the cause the deed of 1801 should be produced, and the identity of the parcels should thereby appear, it could not be successfully argued that the plaintiff was stopped from using the deed as evidence by reason only of the charge in question; and the admissions in the answer respecting the parcels in that deed, and their important bearing upon the question of identity, appear to me to give the plaintiff an interest in it for the purpose of discovery, notwithstanding the charge in question, which, after all, is a mere charge as to the effect in evidence of a document, the contents of which are not known to the plaintiff.

It was argued by *Mr. Collins* that the information stated an imperfect title. I think that that cannot be urged now as a reason for not giving discovery material to the case, which the plaintiff relies upon. That, in effect, would be to hold that when the case comes on *upon exceptions, or on a motion of this kind, the defendant may show the bill is demurrable, and that, therefore, the plaintiff is not entitled to the relief which he asks. I thought one of the New Orders had enabled a defendant to do that, but the LORD CHANCELLOR has expressed a different opinion; and upon that point the rule which he has laid down must govern the present case. [*120]

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The deed of November, 1801, must be produced. The form of the order should be that the defendants are to produce the documents for the plaintiff's inspection, but with liberty to conceal their contents, except what relates to the parcels.

1849. *July* 18, 19, 24.

WIGRAM, V.-C.

[120]

TAYLOR *v.* TAYLOR (1).

(8 Hare, 120—129.)

Interest not given on the arrears of an annuity, unpaid for several years during the progress of the cause—although the suit was instituted by, and a receiver appointed on the application of, the residuary legatee—and the surplus income out of which the annuity was payable was brought into Court, and made productive.

In order to entitle an annuitant, whose annuity is payable from a fund which has been brought into Court, to any profit which may have been made by the investment of the arrears of his annuity, he should procure the arrears to be set apart and distinguished from the general estate.

The claim of an annuitant to interest is not affected by the circumstance that the annuity is secured by a term of years, of which he is himself trustee, if his title to the annuity, in the circumstances of the case, is one of sufficient doubt to require the direction of the Court.

An annuitant who has established his right to an annuity in a proceeding directed by the COURT for trying his right, may immediately apply for the appropriation of the portion of the fund necessary for its payment.

THE testator Joseph Taylor, by his will, made in 1837, gave an annuity of 500*l.* per annum unto Edward Wainhouse (whom he appointed one of his trustees and executors, and who alone acted in
[*121] the trust), for his life, if he *should so long continue solvent, by half-yearly payments, the first half-yearly payment to be made at the end of two years next after his (the testator's) decease; but if the said Edward Wainhouse should become bankrupt, or execute an assignment of his estate for the benefit of his creditors, or take the benefit of the Act for the Relief of Insolvent Debtors, or become insolvent in the ordinary mercantile acceptation of that term, then and from thenceforth the said annuity of 500*l.* to the said Edward Wainhouse should cease and be no longer payable to him or his assigns, and in all or any of the said events, he (the testator) did thereby will and direct that the same annuity of 500*l.* should go to and be paid (instead of to the said Edward Wainhouse or his assigns) unto and equally among Dorothy, Elizabeth, and Caroline, the sisters of the said Edward Wainhouse, for their separate use,

(1) *Blogg* v. *Johnson* (1867) L. R. 2 Ch. 225, 36 L. J. Ch. 859, 16 L. T. 306; *Edwards* v. *Warden* (1876) 1 App. Ca. at p. 305, 45 L. J. Ch. 713, 35 L. T. 174.

for and during their respective natural lives,—such annuity of 500*l.* to continue and be paid to the survivors and survivor of them.

The testator died in 1839.

Edward Wainhouse retained to himself the sums which became due in respect of his annuity up to the 8th of April, 1842. Edward Wainhouse died on the 3rd of September, 1842, much indebted to the testator's estate. The bill was filed by the residuary legatees and devisees, and a receiver was appointed in March, 1844. Elizabeth and Caroline Wainhouse, the surviving sisters of Edward Wainhouse (Dorothy being dead, and Elizabeth being her administratrix, and also the personal representative of Edward), by their answer set forth facts showing that Edward Wainhouse was, at the time of his decease and long prior thereto, insolvent. At the hearing of the cause the COURT directed that the plaintiffs, and the defendants Elizabeth and Caroline Wainhouse, should proceed to a trial of the following issue: "whether, *within the meaning [*122] of the testator's will, the said Edward Wainhouse at any time, and when, if at all, subsequently to the decease of the said testator, was or became insolvent in the ordinary mercantile acceptation of the term." The issue was tried in March, 1846, at the Spring Assizes for the county of York; and the jury found that, within the meaning of the will, Edward Wainhouse, in the month of March, 1842, became and was insolvent in the ordinary mercantile acceptation of the term.

The Master by his report found that 340*l.* 9*s.* 6*d.* was due in respect of the arrears of the annuity to Elizabeth Wainhouse, as the administratrix of Dorothy, to the time of her decease: that 1,528*l.* 14*s.* 7*d.* was due to Elizabeth for such arrears up to the 8th of April, 1849; and that the same amount was due to Caroline for such arrears up to the same time.

The Master found that the defendants Elizabeth and Caroline had claimed interest at 4*l.* per cent. on the said arrear, from the time when such sums became due, and which claim he had disallowed; but at the request of the parties, he found and stated that 4,405*l.* Consols, part of the fund in Court, had arisen from investments of the income of the real and personal estate of the testator, and that 228*l.* Consols, other part of the fund in Court, had arisen from investments of the dividends of the Consols purchased with such income.

The *Solicitor-General* and *Mr. Amphlett*, for the plaintiffs,

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cited, as authorities against the claim of the annuitants to interest on the arrears, the cases of *Booth* v. *Leycester* (1), *Tew* v. *Earl of Winterton* (2), *Creuze* v. *Lowth* (3), [and other cases].

[123] *Mr. Walker* and *Mr. Busk* for the annuitants:

* * It is not necessary to consider how the case would have stood if the fund had been unproductive; and the interest to be given to the annuitants would deprive other parties to that extent of what they would otherwise be entitled to. In this case the Court has to dispose of the interest or dividends which the Master finds to have been actually made upon these arrears. It is clear, also, that the arrear was owing to the conduct of the plaintiff, who being entitled to the residue, disputed the claim to the annuity, and procured it to be withheld on the ground of that dispute. There is in this case a trust, to the benefit of which the annuitant [*124] is equally entitled with the other parties interested under *the will. There is moreover the additional circumstance, that one of the annuitants became by representation the trustee of the term for raising the annuity, and was therefore in a position to satisfy the annuity by exercising his legal powers, if such exercise had not been prevented by the appointment of a receiver. He has been debarred of his legal remedy. * * *

THE VICE-CHANCELLOR:

The question in this case is, whether interest should be paid upon the arrears of an annuity given by the testator in the cause, upon a contingency, to parties whose personal representatives now claim between six and seven years of such arrears. The testator, who died in 1839, gave the annuity in question in a contingent event, namely, in the event of the legatee of the same annuity to whom he gave it in the first instance becoming insolvent in the "ordinary mercantile acceptation of the term," and subject thereto and to the payment of other annuities and charges, he directed the surplus income of his estates to accumulate for the term of eleven years, and then gave his estates with the accumulations to the [*125] infant plaintiff in the cause. The annuity was secured *by a term of years. The event upon which the annuity was given happened in March, 1842. In April, 1843, at or about which time the first payment of the annuity in question became payable, the bill was

(1) 44 R. R. 75 (3 My. & Cr. 459).
(2) 3 Br. C. C. 489.
(3) 4 Br. C. C. 157.

filed, and the object of the bill, I am bound to say (*valeat quantum* this observation), was not simply to decide the question which was raised between the plaintiff and the annuitants, but to execute the general trusts of the will, including the trust for accumulation. In January, 1844, a receiver was appointed, and it being ascertained or admitted that the income of the estate was sufficient for the payment of the annuities, the receiver was ordered to keep down the annuities given by the will, except the annuity upon which the present question has arisen, and the surplus was to accumulate. With respect to the annuity in question, a doubt, and I think a doubt sufficient for the intervention of a court of equity in a case of trust, was raised, viz. whether the event had happened upon which alone the annuity in question was given. An issue was directed to try this. Whether an issue was the proper mode of trying the question, I need not now consider. The issue was tried in March, 1846, and a verdict found in favour of the annuitants. And the case now comes before me on further directions upon the Master's report in the cause and upon the equity reserved. And I am indebted to counsel for all the assistance which can be given to the Court for the purpose of enabling it to decide the question.

If I were to consider the case in the abstract, it is in some respects a very favourable case for giving interest upon the arrears of the annuity. The fund was clear at the time the first payment of the annuity became payable. The annuitants, respecting whose annuities no controversy existed, have received payment of their annuities under the order of the Court. And the surplus income of the estates (including that portion of the income which *the [*126] annuitants in question would have received but for the dispute which has arisen) has been made productive under the order of the Court, and is now in the hands of the Court to be distributed.

This last point does not strictly apply to the question of interest upon the arrears: it may entitle the parties to the profit actually made by the investment of money which ought to have been paid to them instead of being invested. But the question of interest upon the arrears of an annuity depends upon different reasoning. I will notice this point presently, first disposing of the question of interest.

Upon the question of interest, it was properly admitted that the arrears of an annuity do not carry interest, except under special circumstances. The question therefore is, whether any such special circumstances exist in the present case. I need not notice

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the older cases, in which it was held that where the annuity was given for subsistence-money interest would be given on the arrears. The point does not arise, and the cases, I believe, have been overruled. Where the annuity is secured by a penalty, or by a covenant of such a nature that the annuitant might, in either case, have recovered the annuity at law, and has been restrained by this Court from doing so at the instance of the party liable to pay it, the Court has usually given interest upon the arrears, upon the principle of restoring the annuitant to the position he would have been in but for the interference of the Court. Neither of these cases exist in specie in the principal case.

It was, however, said, that the principal case was within the reason of those I have referred to, and, therefore, that interest should be paid on the arrears. The analogy was attempted to be made out in this way: The annuity was, as I have already
[*127] observed, secured by a *term of years; and this term, by representation, came to the parties entitled to the annuity in question: and it was said, that, by means of that term, the annuitants might have enforced payment of their annuity; that it must be assumed they would have done so but for the appointment of the receiver; and that the case must now be dealt with as if the annuitants had so made use of the term and had been restrained by the Court. I am not prepared to adopt this reasoning. Upon general principles I should incline to say that the case must be dealt with precisely in the same way as if the term had vested in another person than the annuitants, and that the annuitants ought not to derive any advantage from the accidental union, in themselves, of the twofold character of trustee, and claimants of the annuity. Assuming (as I do) that the question was one which no mere trustee (being disinterested) would have taken upon himself to decide without the direction of the Court, in a contest between the claimants of the annuity and the plaintiff in the cause, I cannot think that the annuitants ought to be in a better position only because it was for their personal interest, as cestui que trusts, to use their power as trustees for their own benefit. It is a well-established principle, that a trustee shall not use his powers, as such, for his own advantage. But it is unnecessary to enter into this question; for nothing can be more explicit than the answer of the annuitants, in insisting that none of them have ever taken upon themselves the execution of the trusts of the term.

The case then is reduced to this: As soon as one year's annuity

is in arrear, a bill is filed by the devisee of the estate to administer the trusts of the will, one of which is accumulation, and a receiver is necessarily appointed for the benefit of all parties. In that suit, the question whether the annuity is payable arises; and no delay has taken place except that which has arisen in the ordinary *prosecution of the cause. I might refer to the case of *Berrington* v. *Evans* (1), to show that such delay is not a ground for giving interest even upon a judgment. But I do not think it necessary to refer to authority. The question has arisen under the will of the testator, and I cannot treat the devisee of the estate as responsible for the delay which was necessary to its decision. [*128]

If I am right in that, the appointment of the receiver will not affect the case. If no receiver had been appointed, and the money had not been brought into Court, or had not been laid out, interest would not have been payable; and I cannot hold that interest is payable only because a receiver has been appointed and the money brought into Court, in circumstances which made it necessary that the fund should be secured for the benefit of the parties actually entitled.

It was said by *Mr. Walker* that the arrears in this case were distinguishable, as having arisen from the act of the parties interested in the general estate. The distinction on the ground that the arrear has been occasioned by the act of the parties, can only exist where, as in the case I have mentioned, the legal right has been taken away from the annuitant by such act, and it does not occur where, as in this case, there is a substantial dispute under the will. I think there are not circumstances in the case entitling the annuitants to interest on the arrears of their annuity, against the second rule.

Then as to the profit actually made by the investment of the fund in Court. If the parties had desired to have the benefit of the investment, they should have applied to the Court to set apart the portion of the fund or income required for the satisfaction of the annuity, and keep it *distinct from the general funds in the cause. This, however, was not done. The fund was brought in, and all accumulations have been carried to a general account, and the case is therefore not one in which the annuitants can call upon the Court to separate the actual profit produced by any portion of the fund for their exclusive benefit. [*129]

I may observe, that, if at or before the hearing there was any

(1) 41 R. R. 317 (1 Y. & C. 434).

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difficulty in setting apart the amount of the sums which accrued due in respect of the annuity, an application for that purpose might, I think, have been successfully made immediately after the verdict of the jury had found the fact upon which the defendants became entitled.

1850. *Feb.* 7, 11.

WIGRAM, V.-C.

[129]

BEECHING *v.* MORPHEW (1).

(8 Hare, 129—131.)

In the joint answer of a husband and wife to a creditor's bill, for payment out of an estate of which the wife was administratrix, the wife alone set up the Statute of Limitation as a defence to the suit: Held that the interest of the wife was not so merged in the coverture that the Court would disregard her separate defence; and that the statute was, for the protection of the estate, sufficiently pleaded by the wife alone.

A CREDITOR'S bill to recover the balance due on a promissory note for 500*l.*, dated the 20th of December, 1841, against the estate of Edward Brooker, one of the two joint makers of the note, who died in 1842. Brooker was surety for Morphew, the other maker of the note. Morphew became bankrupt in 1846, and the plaintiffs claimed a balance of 322*l.*, and an arrear of interest upon the note, after allowing the amount of the dividends which they had received from the estate of Morphew, and a sum recovered by the realization of property which they had held as a collateral security.

The administratrix of Brooker with the will annexed, and the devisees of his real estate, by their answers, claimed the benefit of the Statute of Limitation. The administratrix was a married woman, and put in a joint answer with her husband; but in the passage in which the protection of the statute was claimed, the husband did not join.

[130]

The *Solicitor-General* and *Mr. Belt*, for the plaintiffs, contended that the statute was not well pleaded, so as to protect the estate The administratrix had also a separate interest in the real estate under the will, and the separate reference to the statute in her answer, if of any effect, would be attributed to her character of devisee, to protect her interest in the real estate, so far as it might constitute a defence.

Mr. Wood and *Mr. Rudall* for the defendants.

THE VICE-CHANCELLOR:

The question is, whether, in a suit constituted as this suit is, the

(1) *Midgley* v. *Midgley* [1893] 3 Ch. 282, 62 L. J. Ch. 905, 16 L. T. 306.

interest of the wife is so completely merged in the coverture that the Court is not at liberty to regard a good defence to the bill, because in the joint answer of husband and wife it is stated in point of form as the defence of the wife only. I cannot think this is the law of the Court. Suppose the husband to have been a stranger to the transactions in question, and to have been ignorant of them altogether, but that the wife in the joint answer had stated that the debt was paid before her marriage, and a receipt in writing, signed by the creditor, given: could it be successfully argued, in such a case, that the husband might not prove the receipt, and avail himself of the wife's defence? I cannot doubt it. The law entitles the creditor to notice that the statute will be relied upon; and if he has that notice in the joint answer of the husband and wife, he has the protection to which the law entitles him. *Shewen* v. *Vanderhorst* (1), I need not rely upon, but in principle I think it applies to the present case. If the parties beneficially interested in the estate were parties, they might have taken the objection. Their presence as *parties (which Lord THURLOW always considered an anomaly) is dispensed with, upon the ground that they are represented by the executrix. Under the modern rule, which allows trustees in certain cases to represent their cestui que trusts, the like reasoning prevails, and that reasoning furnishes the rule in the present case.

[*131]

The objection founded on the statute not being removed, the bill was dismissed with costs.

BOREHAM *v.* BIGNALL (2).

1850.
Feb. 20, 27.
March 12.

(8 Hare, 131—139; S. C. 19 L. J. Ch. 461; 14 Jur. 265.)

WIGRAM, V.-C.

[131]

A bequest of annuity to the testator's nephew for life, or until his bankruptcy or insolvency, and after his decease, bankruptcy, or insolvency, to be paid to his wife, for the personal support of herself, her husband, and his children, during the life of his nephew and his wife, and the survivor of them; and in case they, or either of them, should attempt to alienate the annuity, the trustees to be empowered to apply it towards the support of their children. The first wife of the nephew, to whom he was married before the date of the will, survived the testator, and the gift of the annuity was held not to extend to the widow of the nephew who was his second wife.

A gift of residuary estate in trust for such child or children of A., as being a son or sons should live to attain the age of 25 years, or being a

(1) 32 R. R. 219 (1 Russ. & My. 347).

(2) *In re Drew* [1899] 1 Ch. 336, 68 L. J. Ch. 157, 79 L. T. 656; *In re Coley* [1903] 2 Ch. 102, 72 L. J. Ch. 502, 88 L. T. 517, C.A.

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daughter or daughters should live to attain that age or marry, equally to be divided between them, if more than one; but if but one, then the whole to that one, their, his or her heirs, executors, administrators, or assigns, according to the nature and quality thereof, provided that if any of them should die under such age or time as aforesaid leaving issue him or her surviving, such issue should take the same share as his, her, or their parents, attaining such age as aforesaid would have done; with provision for applying the income of the share of every such child, or his or her issue, or a sufficient part thereof, in their maintenance and education, and for an application of a reasonable part of the expectant share of any such child or their issue, to his, her, or their advancement, notwithstanding their minority: Held to be void for remoteness.

The plaintiffs claiming to be residuary legatees, but failing in that claim on the ground of the remoteness of the bequest, a declaration was made of the invalidity of the trusts, and the costs of the suit were paid out of the estate.

MICHAEL BOREHAM, by his will, dated in 1814, after several specific devises and bequests, gave an annuity to his nephew, James Boreham, for his life, or until his bankruptcy or insolvency, with remainder to the wife of the nephew, during the joint lives of the nephew and his wife, and the life of the survivor, for the support of herself, her husband, and his children, with a provision, in case
[*132] they, or either of them, should attempt to alienate the annuity, *for its application for the support of their children. The construction of this bequest, the words of which are set out in the judgment, ultimately became the principal question in the cause. The testator then bequeathed the residue of his real and personal estate, after payment of his debts, funeral and testamentary expenses, and legacies, and all accumulations to be made from the surplus income, interest, dividends, and proceeds thereof, for the time being, unto his trustees, in trust for all and every such child and children of his nephew, James Boreham, as being a son, or sons, should live to attain the age of twenty-five years, or being a daughter, or daughters, should live to attain that age, or marry with the consent of his trustees, equally to be divided between them; if more than one, share and share alike; and if but one, the whole to that one, their, his, or her heirs, executors, administrators, and assigns, according to the nature thereof absolutely; provided nevertheless that if any of them should die under such age or time as aforesaid, leaving lawful issue him or her surviving, his will was that such issue should take the same share as his, her, or their parents attaining such age as aforesaid would have done, and that the income and proceeds of the share of every such child, or his or her issue, or a sufficient part thereof, should, in the meantime, be applicable to the maintenance and education of each such child, or his or her issue, and that a

reasonable part of the expectant share of any such child or issue, under the trusts aforesaid, should be applicable to his, her, or their advancement in life, if the trustees thereof, for the time being, should see occasion, notwithstanding the minority of any such child or issue.

The testator died in 1814. James Boreham, the nephew, was twice married; he was married, before the date of the will, to his first wife, who was living at the *death of the testator; and by her [*133] he had several children. After her death he was married to Anna Maria, his second wife, by whom he had no children. In 1821, James Boreham took the benefit of the Act for the Relief of Insolvent Debtors, and in February, 1847, he died, leaving Anna Maria, his widow, surviving.

The original bill was filed by James Boreham and his wife and infant daughters; and, after the death of James Boreham, was prosecuted by the daughters alone, for the general accounts of the estate, and the execution of the trusts of the will. A receiver was appointed, and a decree made in the cause, directing, among other things, inquiries for the heir-at-law and next of kin of the testator.

On the hearing of the cause, after the heir-at-law and next of kin were brought before the Court—

The *Solicitor-General*, *Mr. Walker*, *Mr. Kenyon Parker*, *Mr. Wood*, *Mr. Bacon*, *Mr. Roundell Palmer*, *Mr. Campbell*, *Mr. Willcock*, *Mr. Pemberton*, and *Mr. Moore*, were heard for the different parties.

On the validity of limitations for the benefit of the children of James Boreham, the following cases were cited: *Bull* v. *Pritchard* (1), *Newman* v. *Newman* (2), *Marquis of Bute* v. *Harman* (3), *Davies* v. *Fisher* (4). And on the interest of the wife and children, or of the children only, after the insolvency of James Boreham, and on their claim to maintenance during minority: *Brandon* v. *Aston* (5), *Page* [*131] v. *Way* (6), *Wetherell* v. *Wilson* (7), *Kearsley* v. *Woodcock* (8), *Taylor* v. *Bacon* (9), *Bowden* v. *Laing* (10).

The VICE-CHANCELLOR held the limitations of the residuary estate to be void, for remoteness.

(1) 71 R. R. 229 (5 Hare, 567).
(2) 51 R. R. 206 (10 Sim. 51).
(3) 73 R. R. 367 (9 Beav. 320).
(4) 59 R. R. 468 (5 Beav. 201).
(5) 60 R. R. 11 (2 Y. & C. C. C. 24).
(6) 52 R. R. 2 (3 Beav. 20).
(7) 44 R. R. 27 (1 Keen, 80).
(8) 64 R. R. 255 (3 Hare, 185).
(9) 42 R. R. 120 (8 Sim. 100).
(10) 65 R. R. 552 (14 Sim. 113).

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The remaining questions were, first, whether the widow of James Boreham, to whom he was married after the death of the testator, took any interest in the annuity of 100*l.* given by the will to the wife of James Boreham; and, secondly, the plaintiffs being found not to be interested in the general estate, whether they were to receive their costs of the suit out of the estate? On the question of the interest of the widow, *Peppin* v. *Bickford* (1), was cited.

* * * * *

[135] THE VICE-CHANCELLOR:

In this case, the only point which I reserved for consideration was, whether the second wife and widow of James Boreham was entitled to the annuity of 100*l.* per annum, given by the will of Michael Boreham. The facts necessary to be stated are few: Michael Boreham, by his will, amongst other things, gave to his nephew, James Boreham, after the death of his (the testator's wife), the rents and profits of his freehold and copyhold premises at Feltham, as an unalienable personal provision for him and his family during his life. He also gave certain leaseholds in trust, in a certain event, as an additional provision for his nephew James during his life, with a direction that the provisions thereby made for him should not be aliened or charged. And in case they should be aliened, then that the same should be in trust for his (James's) wife and children. The will then, after certain other directions, proceeded as follows: "And as to the residue of my stocks or funds and other sufficient parts of my property, I do hereby direct my trustees and executors to set apart and appropriate a sufficient part thereof in trust, to answer and pay a further annuity or clear yearly sum of 100*l.* into the proper hands of my said nephew, James Boreham, from the
[*136] time of my decease, *for his personal support, in such manner as to them shall seem best, and so as that the same may not be anticipated, aliened, charged, or affected in anywise howsoever. And the same to be and continue payable half-yearly or quarterly during his natural life, or until he shall become bankrupt or insolvent; and from and after his decease, or in case he shall become bankrupt or insolvent, then I will and declare, that the same annuity or yearly sum shall be paid and payable to the wife of him the said James Boreham, as some provision for the personal support of herself and of her husband and his children, as an unalienable provision during the life of the said James Boreham and his wife, and of the survivor

(1) 4 R. R. 103 (3 Ves. 570).

of them; and in case they or either of them shall attempt to alienate, charge, or incumber the said last-mentioned provision or annuity, it shall be in the power of my said trustees or executors to withhold the payment thereof altogether, or to apply the same for or towards the support of their children, in such manner as they may think fit."

At the date of the will, James Boreham was married to his first wife, and James and that wife survived the testator. James Boreham twice took the benefit of the Insolvent Debtors' Act during the life of his first wife. His first wife died, and James married his second wife, now his widow. James is since dead. On both occasions of James's insolvency, the benefit of the Act was obtained on his own application, and the question I have to answer is, whether his widow is entitled during her life to the annuity of 100*l.* a-year given by the last of the clauses in the will of Michael Boreham.

If this question were addressed to a person not bound by legal rules of construction, he would have difficulty in admitting that effect would be given to the intention of the testator, if the widow of James were not to enjoy *the annuity for her life. The question however which I have to consider is, whether the will gives it her or not, and it is with regret I have come to the conclusion that the will does not give it to her. [*137]

In considering the construction of the will, I am compelled to consider it, not only with reference to the events which actually happened, but to those which might have happened, and are expressly provided for by the will. To this extent, at least, I must go; and if the construction which would give the annuity to the widow of James is incompatible with the construction which such other events require, I must (however satisfied I may be that I am disappointing the real intention of the testator by doing so,) hold that the case of James's second marriage is a *casus omissus* from the will, and that consequently the widow of James has no interest in the annuity.

Now the will directs, that, in case of James' insolvency, the annuity shall be paid to his wife during the joint lives of James and his wife, and the survivor of them, for the purposes mentioned in the will. It further provides, that, if they or either of them shall attempt to alien the annuity, it shall be in the power of the trustees to withhold the annuity altogether, or apply it for the support of their children.

Now, without relying on the insolvency of James as an attempt to alien (which in law it was), suppose James to have attempted to

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alien the annuity otherwise than by insolvency. The trustees, in that case, would have had power to apply the annuity for the benefit of the children of James by his first wife, but not even for the benefit of that wife. How, then, could James' second marriage revive the annuity for the benefit of the second wife.

[138] It may be said, that, according to the words of the will, the annuity, in the case of alienation by insolvency, was to go to James' wife; but I cannot either consider this as qualified by the power immediately afterwards given to the trustees, or that the testator, in the clause giving such power to the trustees, contemplated alienation or attempted alienation, by some act other than insolvency, which, in an ordinary acceptation, is not looked upon as alienation by the act of the party. And, unfortunately, I am bound to adopt a construction of the will, which would have met the case of alienation, or attempted alienation by James, otherwise than by insolvency.

The word "their" in describing the children, for whose support the trustees have power to apply the annuity in the events mentioned in the will, is conclusive in showing that one wife only of James was in the contemplation of the testator, and that wife must have been the one living at the date of the will. This criticism upon the word "their" unfortunately confirms the conclusion to which the general argument upon the will appears to me to lead; I have never before seen a case in which I was more satisfied than I am in this case, that the real intention of the testator, which certainly was to insure some provision for James and his family (which word "family" would include his wife, and children by any wife), is disappointed by the omission of the testator to provide for the case of a second marriage by James.

The case of *Peppin* v. *Bickford* (1) does not help the case. Independently of the circumstance that, in that case, the legatee was unmarried at the date of the will, and of the testator's death,

[*139] the gift in tail, after *the death of the nephew and his wife, might have been disappointed if the word "wife" had been confined to the first wife only.

The invalidity of the residuary gift was declared, and consequential directions given, and the costs of all parties ordered to be paid out of the estate.

(1) 4 R. R. 103 (3 Ves. 570).

BROWN *v.* WHITEWAY (1).

1846. *Feb.* 20.

(8 Hare, 145—157.)

WIGRAM, V.-C.

Under a devise to trustees and their heirs before the Wills Act upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others which in themselves would not do so,—the whole legal fee remained in the trustees. [145]

THE bill stated the will of Thomas Brown, made in 1818, whereby he devised unto Dennis Brown and John Brown, and the survivor of them, his heirs, executors, administrators, and assigns, all and every his freehold and leasehold messuages, lands, tenements, and hereditaments, to, for, and upon the several uses, trusts, and confidences thereinafter mentioned, viz.—in trust to pay and apply the rents, profits, and produce thereof, unto and to the use of his wife Elizabeth, for her life; and *from and immediately after her decease, as to his [*146] freehold messuages, lands, tenements, and hereditaments at Furzebrook, in the Isle of Purbeck, together with right of common and turbary in Furzebrook Heath, and right of common for sheep on Creech Down and the appurtenances, (save and except thereout the pits and veins of clay therein, together with the rents and profits thereof, which were devised in and by the residuary clause thereinafter contained), in trust, and to and for the use of his daughter Mary, for her life, and from and after her decease, in trust, and to and for the use of such person or persons, for such estate or estates, &c., as his said daughter Mary should by will devise, limit, or appoint, and in default thereof, in trust, and to and for the use of the heirs of the body of his said daughter Mary; and in default of such issue, then in trust, and to and for the sole and separate use of his daughter Sophia, for her life, and from and after her decease, in trust, and to and for the use of the heirs of the body of his said daughter Sophia; but in default of such issue, then in trust, and to and for the use of all and every the children of his brother Giles Brown, and their respective heirs and assigns, as vested interests, in equal proportions, and as tenants in common. (Then followed a declaration of the trusts of certain premises in Wareham, for the benefit of his daughters and his brother Giles, and their respective children successively.) And, as to his freehold messuages, lands, tenements, and hereditaments at Killwood, together with right of common and turbary in Furzebrook Heath, and right for sheep on Creech Down, with the appurtenances, (save and except the pits and veins of clay

(1) *Van Grutten* v. *Foxwell* [1897] A. C. 658, see p. 681, 66 L. J. Q. B. 745, 77 L. T. 170; *Marshall* v. *Gingell* (1882) 21 Ch. D. 790, 51 L. J. Ch. 818, 47 L. T. 819.

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therein, together with the rents and profits thereof, which were devised in and by the residuary clause thereinafter contained), and also his freehold premises at Stoborough, East Moor, and East Haws, in trust, to pay the rents, and profits, and produce thereof unto and to and for the sole and separate use of his said daughter [*147] Sophia, *for her life, and from and immediately after her decease, in trust, and to and for the use of the heirs of the body of his said daughter Sophia; and in default of such issue, in trust, and to and for the use of his said daughter Mary, for her life, and from and immediately after her decease, in trust, and to and for the use of the heirs of the body of his said daughter Mary; but in default of such issue, in trust, and to and for the use of all and every the said children of his brother Giles Brown, and their respective heirs and assigns, as vested interests, in equal proportions, and as tenants in common; and as to the pits and veins of clay in and upon his lands at Furzebrook and Killwood aforesaid, or either of them, together with the rents and profits of such pits and veins of clay, and the residue and remainder of his real and personal estate and effects, subject to the payment of his debts, funeral expenses, and the charges of proving his will, he gave and devised the same unto the said Dennis Brown and John Brown, and the survivor of them, his heirs, executors, administrators, and assigns, upon the trusts and confidences, and to the uses following, viz., upon trust to permit his said wife to receive and take the interest, income, dividends, rents, and profits thereof for her life; and from and after her decease, as to one moiety or half part thereof, in trust to pay the income, dividends, interest, rents, produce, and profits of such moiety unto and to and for the use of his said daughter Mary for her life, and from and after her decease in trust, and to and for the use of such person or persons, &c. as his said daughter Mary by will should devise, bequeath, or appoint the same, and in default of such appointment, then in trust, and to and for the use of all and every the child and children of his daughter Mary, if more than one, in equal portions, as tenants in common, and if but one, the whole of such moiety to such one child; and in default of such [*148] issue, then in trust to pay the interest, dividends, rents, *produce, and profits of the said moiety, unto and to the sole and separate use of his said daughter Sophia for her life, and from and after the decease of his said daughter Sophia, in trust, and to and for the use of all and every the child or children of his said daughter Sophia, if more than one, in equal proportions as tenants in common, and

if but one, the whole of such moiety to such one child; but in default of such issue of his said daughter Sophia, then in trust, and to and for the use of all and every the said children of his brother Giles Brown deceased, their respective heirs, executors, administrators, and assigns, as vested interests, in equal proportions, and as tenants in common; and as to the other moiety or half part thereof, upon trust to pay unto his said daughter Sophia the income, dividends, interests, rents, profits, and produce thereof, to and for her sole and separate use and benefit, for her life; and from and after her decease, in trust to and for the use of all and every the child and children of his said daughter Sophia, if more than one, to be divided between them in equal proportions, as tenants in common and not as joint tenants, and if but one, the whole of such last-mentioned moiety to and for the use of such one child; and in default of such issue, then in trust, and to and for the use of his said daughter Mary for her life, and from and after her decease, in trust, to and for the use of all and every the child and children of his said daughter Mary, if more than one in equal proportions, as tenants in common, and if but one, the whole of the said last-mentioned moiety to such one child; but in default of such issue, then in trust, and to and for the use of all and every the said children of his brother Giles Brown, and their respective heirs, executors, administrators, and assigns, as vested interests, in equal proportions, and as tenants in common.

The testator left his widow, and his two daughters Mary and Sophia, and six children of his brother Giles *Brown, surviving. [*149] Sophia the daughter had, before the date of the will, married John Brown, of East Street. She had no issue. The widow died in 1818. Mary, the other daughter, afterwards married T. Phippard, and died in 1845, without having had any issue, and without having exercised the power of appointment given to her by the will.

The bill was filed by two of the children of the testator's brother Giles Brown, and the heir-at-law of another of such children, against Dennis Brown and John Brown, the trustees of the will, who were two other of the children of Giles Brown,—Dennis Brown being also the heir-at-law of a deceased child of Giles Brown,—and also against Samuel Whiteway and four other persons, partners with him. The bill stated the will, and alleged that at the date of the will and of the testator's death certain pits and veins of clay were open and being worked in the lands at Furzebrook and Killwood, and that by a lease dated in June, 1817, the testator had

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demised such open pits or veins of clay for a term of fourteen years from Midsummer, 1817, at a rent of 200*l.*, and that the said lease being about to expire, the defendants, John Brown, of East Street, and Sophia his wife, were desirous that a new lease should be granted of such pits and veins, and also of other pits and veins of clay to be opened and worked in the lands at Furzebrook, and that the said Mary Phippard, who was then entitled to the rents of the lands at Furzebrook under the will, opposed the making of such lease: that thereupon, in November, 1830, the said John Brown, of East Street, and Sophia his wife, exhibited their bill of complaint in this Court against the said other parties interested under the will of the testator, praying a declaration that the pits and veins of clay in or upon the said testator's lands at Furzebrook and Killwood, whether inclosed or uninclosed, ought to be worked so as to yield a fair and reasonable rent and profit, to be applied according [*150] to the trusts of the said *testator's will; and that the persons who were entitled or authorised to work or dig the same, were entitled to enter for that purpose upon all or any of the said lands at Furzebrook and Killwood, making an adequate compensation for any injury which they should do to the surface, and that it might be referred to one of the Masters of the Court to let and demise the said pits and veins of clay for such term or terms of years, and on such terms and for such prices as should be warranted by the said testator's will; and by a decree made in the said cause by the MASTER OF THE ROLLS on the 3rd day of July, 1832, it was declared, that the devise contained in the said will of the said pits and veins of clay comprised only the pits and veins of clay which, at the date of the said will, were being worked under the said indenture of lease of the 24th day of June, 1817, situate at Killwood and Furzebrook Heath. The bill then stated that John Brown, of East Street, and Sophia his wife, pretending and claiming that the said Sophia was tenant in tail of the same lands, the said Sophia, with the privity and approbation of her said husband, executed a deed, dated the 23rd of June, 1845, for disintailing the said land at Furzebrook, and all other the lands of which the testator was seised at the time of his death, either at law or in equity, and for conveying the same to such uses as the defendants, John Brown, of East Street, and Sophia his wife should appoint, and subject thereto, during their joint lives, upon trust for the separate use of the said Sophia; and after the decease of both of them, if the said John Brown, of East Street, should be the survivor, to the use of him and his heirs; and if the said Sophia

should be the survivor, to her use for her life, with remainder to the use of the said John Brown, of East Street, and his heirs: that such deed was duly acknowledged by the defendant Sophia Brown, and enrolled.

The bill stated that the defendants, John Brown and Sophia his [151] wife, had, by a lease of the 20th of September, 1845, appointed and demised to the defendants, Whiteway and his four partners, part of the lands at Furzebrook, and all and every the mines, depths, and strata or beds, veins, and pits of clay, minerals, and other things which were then open, or might be found or discovered within or under the said fields or closes of lands, with the appurtenances, with full, free, and exclusive license for the said lessees, their executors, &c., to enter upon the said fields or closes of land, to dig, sink, and work any mines, pits, or shafts, &c., for the winning or getting any clay or minerals, in, upon, or out of the demised premises, and to take and carry away such clay and minerals, for a certain term, at a certain rent therein mentioned. That the defendants, Whiteway and his partners, on the 21st of September, 1845, with the sanction of the defendants, John Brown, of East Street, and Sophia his wife, and acting under the said appointment and demise, entered upon two ancient inclosures, parcel of the said lands at Furzebrook, included in the said appointment, and opened a new pit, shaft, or mine thereon, which had never before been opened, and therefrom raised and carried away clay and other minerals, and sold the same, and that they intended to continue such working.

The bill charged that Sophia Brown was, according to the true construction of the will, equitable tenant for life only of the said lands at Furzebrook; and that, in case of her decease and failure of issue of her body, the same lands would belong to the plaintiffs, and the defendants, Dennis Brown and John Brown, as owners of the fee thereof.

The bill prayed that Whiteway, and the four defendants his partners, might account for the clay and minerals so gotten by them, and that the proceeds thereof *might be secured for the [*152] benefit of the persons interested in the said lands; and that the said defendants, and John Brown and Sophia his wife, might be restrained, by injunction, from continuing to work the said pit or mine, or opening any other pits or mines, in the said lands.

The defendants, Whiteway and his partners, and John Brown and Sophia his wife demurred, for that the plaintiffs had not shown by

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their bill that they, or any of them, had, or were, or was entitled to any estate, right, title, or interest in or to the said closes of land at Furzebrook.

Mr. Shapter for the demurrer:

The question is, whether the limitations of Furzebrook to Sophia for life, and the remainder to the heirs of her body, are both equitable; or whether the former alone is equitable, and the latter legal. The defendants contend that both limitations are equitable; that Sophia was tenant in tail, and acquired the fee. The question resolves itself into this,—whether the trustees did not take the whole fee of Furzebrook? The testator gives all his estates to trustees and their heirs, to pay the rents to his widow for life,—which is an equitable estate; then as to Furzebrook, to the use of his daughter Mary, her appointees, and the heirs of her body; and then in trust for the separate use of his daughter Sophia, an equitable estate (see 14 M. & W. 166); and then to the heirs of her body, with remainder to the children of Giles Brown and their heirs. The Killwood estate is devised in the same way, except that Sophia and her issue take before Mary and her issue. The testator then devises the pits and veins of clay under Furzebrook and Killwood, with his residuary personal estate, to the trustees, their heirs, executors, &c., upon trust, to pay the income to the widow for life, [*153] giving her an equitable interest; and *then a moiety to each daughter for life, with remainder to their children as purchasers, with cross remainders, and with an ultimate remainder to the children of Giles Brown,—the gift of Mary's own original moiety to her; and the original and cross gifts to Sophia being of equitable interests. That no more of the legal estate remains in the trustees than the trusts require, as a general proposition, is not disputed. The defendants contend, that here the trusts require the whole fee so to remain. The devise to trustees and their heirs vests the legal fee; and to cut it down to a less estate, the testator's intention must be clearly shown from the terms or objects of the will: [*Doe* v. *Willan* (1), *Houston* v. *Hughes* (2), *Doe* v. *Simpson* (3)]; but it is improbable that he should intend the legal estate to move, first, to the trustees for one period, then to the parties beneficially interested for another period, and then again to the trustees, and thus backwards and forwards. No such instance is to be found;

(1) 20 R. R. 355 (2 B. & Ald. 91): per ABBOTT, Ch. J.

(2) 30 R. R. 372 (6 B. & C. 403).

(3) 46 R. R. 424 (5 East, 162, 172).

but, on the contrary, the case of *Harton* v. *Harton* (1), as explained by Lord ELDON in *Hawkins* v. *Luscombe* (2); and by Lord ALVANLEY, Ch. J., in *Kenrick* v. *Lord W. Beauclerk* (3), is an authority that the fee shall rest in the trustees. * * Where there are any limitations [154] which require the protection of the fee, *Rochfort* v. *Fitzmaurice* (4), *Venables* v. *Morris* (5),—the fee given to the trustees remains with them. * * The circumstance that the clay pits and residuary personal estate are limited together, strengthens the inference that the legal estate was to remain in the trustees: *Houston* v. *Hughes* (6), and *Doe* v. *Simpson* (7).

Mr. Malins and *Mr. Jebb* for the bill:

The pits and veins of clay specifically mentioned in the will, and of which Sophia is tenant for life, are the pits and veins opened at the testator's decease, according to *the decision at the Rolls (stated [*155] in the bill). The bill seeks to restrain the defendants from opening new pits.

The plaintiffs contend that the limitation of Furzebrook to Sophia is equitable, and that the limitation to the heirs of her body is legal. * * The case of *Harton* v. *Harton* was decided, but not reasoned. There was no necessity in that case for the construction which gave the trustees the fee, although there might have been some convenience in it. In *Houston* v. *Hughes* (8), the like construction was founded on the circumstance that the freeholds and leaseholds were not given in distinct clauses. Here they are limited in distinct clauses. In *White* v. *Parker* (9), the property was given in fourths, and it was not to be conceived without necessity that the legal estate was to vest as to some and not as to other undivided shares.

If this construction be right, the plaintiffs are tenants in fee in [156] remainder expectant on the decease of Sarah (10).

THE VICE-CHANCELLOR:

I did not remember the case of *Harton* v. *Harton*, nor do I now recollect having ever had to consider it. I do not see why, in that

(1) 4 R. R. 537 (7 T. R. 652).
(2) See 2 Swanst. 391.
(3) 6 R. R. 746 (see 3 Bos. & P. 179).
(4) 59 R. R. 617 (2 Dr. & War. 1, 16).
(5) 7 T. R. 342.
(6) 30 R. R. at p. 383 (6 B. & C. at p. 421).
(7) 46 R. R. 524 (5 East, 172).
(8) 30 R. R. 372 (6 B. & C. 403).
(9) 41 R. R. 636 (1 Bing. N. C. 573).
(10) *Sic.*

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case, it was necessary to hold that the intermediate estates should not be good legal estates. There was a devise to trustees and their heirs, upon trust, to permit and suffer the testator's niece Bridget, the wife of William Harton, to receive the rents and profits, for her life, for her separate use, with remainder to her issue; and, failing such issue, then to another married woman, for her life, for her separate use, and remainder to her issue; and, failing her issue, then to a third niece of the testator in a like form. The question arose, whether the eldest son of Bridget, who was the first tenant for life, took a legal estate or not; and the ultimate limitations would not, and did not come under the view of the Court at all. The Court had only to consider the devise to trustees and their heirs, with remainder over to the first son and the heirs of his body, and so forth. The COURT appears, as Mr. Jarman observes, to have thought it most convenient,—having been obliged to hold that one of the limitations gave a legal estate to the trustees,—to hold that the other limitation had the same effect. I must not be understood to say anything against that case. It is a decision unshaken; and I cannot, upon demurrer, take upon myself to overrule or disregard the decision of a court of law upon the point.

In the principal case, the testator devises to trustees and their heirs, for his widow, for her life; and then follows the limitation to Mary, in terms which would give a legal estate to Mary; and then

[*157] the property is *to go according to her appointment, and in default of the appointment to the heirs of her body. Then come the trusts to the sole and separate use of Sophia, and the heirs of her body, with remainders over in like manner. I cannot, in principle, distinguish this case from *Harton* v. *Harton*. If parties wish to review that decision they must take a case to a court of law. The effect of overruling this demurrer would be to overrule the decision in *Harton* v. *Harton*.

I allow the demurrer.

1850.
Feb. 9, 12, 20.

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[159]

ELSEY *v.* LUTYENS.

(8 Hare, 159—165.)

A conveyance of lands in Middlesex by settlement upon the marriage of the settlor, registered under the statute 7 Ann. c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement, had notice of the unregistered conveyance after the marriage, but before the registry of his settlement.

A party having a legal title may sustain a bill in equity to recover deeds, without first having established his title at law, where a deed to be recovered

would be the proper evidence in a trial at law to enforce the legal right against the tenant in possession of the property in question, and that notwithstanding the evidence furnished by the deed might have been obtained by means other than a suit in equity.

Decree as between the claimant of property and the trustee who claimed to hold the same property in trust for an infant defendant, reserving the right of the infant defendant.

Position, duty, and liability of a trustee for infants of an estate created by an invalid deed or a deed of doubtful validity, which is impeached by other parties.

IN 1833, William Mair devised a freehold house in Kensington to his daughter Lady Wetherall, in tail, with remainders over. Lady Wetherall died in June, 1846, leaving one daughter, Eliza Henrietta, then the widow of a Mr. Wetherall, by whom she had a daughter, Frederica Charlotte. In August, 1847, Eliza Henrietta married the plaintiff William Elsey, and previous to, and in consideration of that marriage, she executed a disentailing deed, and conveyed the premises to the use of herself until the marriage, and thereupon to the use of the plaintiff in fee. This deed was dated the 6th of August, 1847. It was duly enrolled under the Fines and Recoveries Act (1), and was, after the marriage had taken place, registered pursuant to the Act for the registration of deeds in the county of Middlesex (2).

After the marriage, the plaintiff was informed of a deed dated the 25th of February, 1845, executed by Lady Wetherall, and enrolled under the statute 3 & 4 Will. IV. c. 74, whereby she conveyed the premises to the defendant Lutyens, and other trustees, since deceased, to such uses as she should appoint; and in default of appointment to her own use for life, and after her decease to the use of the said Eliza Henrietta her daughter for life, for her separate use, without power of anticipation, and after her decease to the use of Frederica Charlotte, the daughter of Henrietta, and the heirs of her body, with remainders over. This deed was not registered under the statute 7 Anne, c. 20.

Soon after the plaintiff received notice of the existence of the deed of February, 1845, he caused the deed of August, 1847, to be registered, as above stated. [160]

The house was in the occupation of a tenant under a lease for twenty-one years, dated the 16th of September, 1845, granted by Lady Wetherall, the counterpart of which lease was in the possession of an agent of the defendant Lutyens. The plaintiff brought his action against the tenant for the rent which accrued due subsequently

(1) 3 & 4 Will. IV. c. 74. (2) 7 Anne, c. 20.

BROWN v. WHITEWAY.

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(1) 3 & 4 Will. IV. c. 74. (2) 7 Anne, c. 20.

ELSEY v. LUTYENS.

to the death of Lady Wetherall, and filed his bill against Lutyens, the surviving trustee under the indenture of the 25th of February, 1845, for the delivery up of the counterpart of the lease to the plaintiff, and praying also that the deed of February, 1845, might be delivered up and cancelled. Eliza Henrietta the plaintiff's wife, and Frederica Charlotte, her infant daughter, were defendants.

The *Solicitor-General* and *Mr. Joliffe* for the plaintiff. * * *

[161] *Mr. Wood* and *Mr. Berkely* for the defendant Lutyens:

The plaintiff has mistaken his course. If the deed of February, 1845, be void against him, he might have disregarded it. It is not a case for the interference of the Court: *Simpson* v. *Lord Howden* (1); or at least, until the right at law has been determined. * * The statute does not make all unregistered deeds void, but only makes a registered deed good against all prior unregistered deeds. In this case, at the time when the plaintiff had notice of the prior deed, both deeds were equally void or liable to be avoided. The defendant, as trustee, submits that the plaintiff, by then registering his deed, could not acquire a title in preference to the earlier deed.

Mr. Cox, for the infant Frederica Charlotte Wetherall, on whose behalf no evidence had been entered into, stated to the Court that he was instructed by the solicitor of the plaintiff, the plaintiff being the husband of the infant's mother. He submitted that the decree should reserve the right of the infant, or be without prejudice to such right.

[162] The *Solicitor-General* in reply, on the point of notice, cited *Essex* v. *Baugh* (2).

The VICE-CHANCELLOR directed the case to stand over, with liberty to the plaintiff to bring such action as he might be advised; the defendant Lutyens to produce the lease, and admit possession; and reserved further directions and costs.

Feb. 12. The counsel for the defendant Lutyens stated that the defendant would act under the direction of the Court; but would not undertake to defend any action at law which might be brought by the plaintiff, in respect of the property or lease in question.

The VICE-CHANCELLOR made the decree for the delivery of the lease, without prejudice to the right of the infant.

(1) 45 R. R. 225 (3 My. & Cr. 97). (2) 57 R. R. 476 (1 Y. & C. C. C. 620).

THE VICE-CHANCELLOR:

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In this case, I reserved the question of costs as between the plaintiff and the defendant Lutyens, and much difficulty I have had in satisfying myself, as far as I have done so, what order I ought to make.

The plaintiffs have got a decree without a trial at law, saving however to the infant, whose trustee Lutyens is, the right hereafter to litigate the question raised in the suit, if she should be advised so to do. The peculiar circumstance which induced me so to qualify the decree (a qualification not objected to by the plaintiff) was this, that the plaintiff's solicitor instructed counsel for the infant. My attention was particularly called to the point by, I think, the plaintiff's counsel; a circumstance I am bound to notice with approbation. Lutyens, by his *answer, after stating the facts of the [*163] case, submits the questions in the cause to the judgment of the Court as questions arising between the plaintiff and the infant. These observations, coupled with the limited decree I have felt at liberty to make, appear to me to entitle Lutyens to the favourable consideration of the Court upon the question of costs, especially when it is considered that I am called upon to take out of his hands the only indemnity he has against his own cestui que trusts; the hostile position he assumed in argument was forced upon him by the plaintiff asking costs against him.

Other observations also arise upon the same question: the plaintiff's title is purely a legal title; and at the hearing of the cause I thought the case was one of that class in which the strict rule of the Court originally required that the plaintiff should establish his right at law before he came into equity. In cases of this class, where the bill is filed before the right is established at law, and the equity is founded upon the better remedy to be had in this Court (as in tithe cases) the usual practice is to retain the bill at the hearing, with liberty for the plaintiff to proceed at law to establish his title. But in such cases the plaintiff gives the defendant upon the question of costs the advantage of being able to say, that if the plaintiff had first established his right at law, the defendant would have done that without suit which the bill in equity required him to do. And this argument was urged upon me by Mr. Lutyens' counsel at the hearing.

In this case, however, it appears to me that the plaintiff may possibly have an equity distinct from that of having deeds delivered up. It is not, I think, suggested by the defendant, that the lease

ELSEY v. LUTYENS.

granted by Lady Wetherall is not good as against the plaintiff in this cause. If that lease be valid, the most convenient mode of trying
[*164] *the plaintiff's title at law must be by proceeding against the tenant for the rent reserved under the covenants in the lease; and to do this the plaintiff requires the manual possession of the lease, which is in the hands of Lutyens; and I find the bill suggests this point as a ground for coming into equity. It was said indeed by the defendant, that the plaintiff might proceed at law against Lutyens to get possession of the lease, or that they might proceed against the tenant for the rent, and call Lutyens as a witness to produce the lease. Admitting that the plaintiff might effectually prosecute his right at law in both or either of the ways suggested, I do not think that the plaintiff thereby loses his right to come into this Court, and obtain its assistance in putting the question at issue between himself on the one side, and Lutyens and the infant on the other in a course of trial. It is between the plaintiff and these parties that the real contest arises, and not between the plaintiff and the lessee under Lady Wetherall's lease; and I cannot, as at present advised, decide the question of costs in this suit upon the ground that the plaintiff was not justified in filing the present bill before the legal right was established: but this does not disturb the proposition that the legal right must be established by a proceeding at law, before this Court can make a decree in the plaintiff's favour.

The plaintiff, by the manner in which he has brought the suit to a hearing, has involved himself in a difficulty upon the question of costs. If, to put an extreme case, a plaintiff suing a trustee and his cestui que trusts, should compromise the suit with the cestui que trusts before the hearing, and thereby avoid the trial of the right, I cannot think the Court would give costs against the trustee, as it might have done, if the cause had been tried, and a decree made adversely by the Court. The present case is not widely distinguishable from that.

[165] Another point argued by the plaintiff was, that the point of law was so clear that Lutyens ought not to have contested the question; but I cannot admit the force of that observation, where a trustee is the party charged. Lutyens, at the peril of having to pay costs at law had a right to insist upon having the question tried at law; and I cannot deprive him of the benefit of the observation, that, if that course had been taken, he would not have contested the case further. I do not, however, understand Lutyens now to say that he desires to try the case at law for the purpose of saving his costs of this suit by depriving the plaintiff of his decree.

I believe the proper decree to be made as to the costs of the suit in equity is, to give no costs to or against Lutyens. The qualified decree the plaintiff has obtained takes this case out of the general rule which I have rarely departed from, of making the costs abide the result of the suit. The plaintiff has got a decree, which, though nominally qualified, is (I think I may promise him) virtually final, and he has got this without a trial at law.

Lutyens loses his own costs of this suit unless he has the means of obtaining them from or against his own cestui que trusts; but he avoids all legal proceedings, with their attendant expenses. In the view I take of the actual rights of the parties, I cannot give him his costs of this suit, unless the plaintiff will consent to pay them, or Mr. Lutyens can establish the proposition, that the unregistered settlement of which he is a trustee has priority over the plaintiff's claim.

This Court doth order and decree, that the defendant Benjamin Lutyens do deliver up the indenture of the 16th day of September, 1845, in &c., to the plaintiff. Liberty to any of the parties to apply. But this is to be without prejudice to the rights of the infant defendant Frederica Charlotte Wetherall.—Reg. Lib. A. 1849, fo. 714.

DICKINSON *v.* MORT (1).

1850. *April* 23.

(8 Hare, 178—180.)

WIGRAM, V.-C. [178]

Under a power to charge an estate with a sum not exceeding 1,000*l.*, for the portion or portions of a younger child or younger children, the donee of the power appointed the 1,000*l.* to a married daughter for her separate use, with a restraint upon anticipation during the coverture; and it was held, that the interest of the appointee might lawfully be so restricted by the terms of the appointment.

ELISHA SHELMERDINE, by his will, made in 1805, devised certain real estates to his son Elijah, for life, with remainder to his issue in tail, and declared that it should be lawful for his son Elijah to charge his said estate at Kennedey and Peers Lane, thereinbefore mentioned, in case of his marriage, with any sum or sums of money not exceeding 1,000*l.*, for a portion or portions of a daughter or daughters, younger son or sons, with interest for the same not exceeding 4*l.*

(1) In later cases the restraint on anticipation has been rejected: *In re Cunynghame's Settlement* (1871) L. R. 11 Eq. 324, 40 L. J. Ch. 247, 24 L. T. 124; *Whitby* v. *Mitchell* (1889) 42 Ch. D. 494, affirmed, 44 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. 771; but possibly the appointee in the present case may have been born before the power came into operation. —O. A. S.

DICKINSON v. MORT.

for every 100*l.* by the year. Elijah the son, by his will, dated in 1835, expressed to be in pursuance of the power, appointed 1,000*l.* to trustees, upon trust for his daughter Sarah, the wife of Robert Dickinson, for her life, for her separate use, without power of anticipation, and, after her decease, for her children, who being sons should attain twenty-one, or die under that age leaving issue, or being daughters should attain that age, or marry; and if there should be no such child of his daughter Sarah, then in trust for his (Elijah's) next of kin; with provisions for maintenance and advancement of the children of Sarah out of the trust fund.

The 1,000*l.* was raised. Sarah, the daughter, was the plaintiff in the suit; and her husband and children, and the trustees of the fund, were defendants. The question was how far the appointment by the will of Elijah was valid. It was conceded that the attempt by Elijah, in executing the power, to create interests in the children of Sarah, was ineffectual.

[179] *Mr. Temple* and *Mr. Hingeston*, for the plaintiff, in support of the validity of the limitation to the separate use of the plaintiff with restraint on anticipation, cited *Carver* v. *Bowles* (1).

Mr. Taylor, for the husband of the plaintiff, contended, that the appointment had the effect of giving the plaintiff the absolute interest in the 1,000*l.*, unaffected by the limitation to her separate use, and unrestricted from anticipation. * * *

Mr. Willcock and *Mr. Erskine* for other parties.

The VICE-CHANCELLOR said, that the argument for the husband must go the length of saying, that the donee of the power, having power to charge the estate with a certain sum, could not appoint less than the whole sum which he was empowered to give; for, if he might appoint a smaller sum, why might he not, on the same principle, appoint less than an absolute interest. If the donee of the power might appoint a smaller sum than that which the utmost exercise of the power would enable him to give, as in this case he clearly could, why might he not also make the appointment for the life of the object of the power, or render the interest of the appointee determinable upon certain acts, or introduce provisions restraining the appointee in this case from parting with the property during the coverture. He was of opinion that there was nothing invalid in the

(1) 34 R. R. 102 (2 Russ. & My. 304).

restrictive terms of the *appointment; and that Sarah, the daughter, must be declared to be entitled to the sum in question, for her separate use, without power of anticipation; with liberty to all parties to apply.

DICKINSON v. MORT. [*180]

SPEAKMAN *v.* SPEAKMAN.

(8 Hare, 180—187.)

1849. *Dec.* 11, 12. 1850. *Jan.* 11.

WIGRAM, V.-C. [180]

A testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement; and after his youngest child should have attained twenty-one, he directed his executors to divide any surplus in their hands, every three years, during his wife's life or widowhood, and, after her death or marriage, every year, equally amongst his children, or their heirs in stead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that, at the end of the said fifty years, his executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead, and if any of his said children should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs, equally: Held, that the Court could not read "or" as "and," where the purpose was manifestly substitution of objects, and not succession.

That the word "heirs" must be construed "issue," and not "children"; and that it was not a ground for departing from such a meaning, that the consequence of adhering to it would be to render the will void for remoteness.

That the words of the gift did not direct a substitution, once for all, of persons to take each child's share at a given time not too remote; but contained a running direction to the trustees, to pay the income from time to time, during the whole period of fifty years, to the children, or, in case of their deaths, to such of their lineal descendants as might from time to time come *in esse*.

That the limitations of the property at the end of the term of fifty years were void for remoteness.

THOMAS SPEAKMAN by his will, dated 20th April, 1793, executed so as to pass freehold estates by devise, after directing his funeral and testamentary expenses and debts to be paid out of his real and personal estate; and that the rent of certain premises in Parr, in Lancashire, and of the coal under the same, and of a seat in St. Helen's Chapel, should be applied in paying off a mortgage upon the above-mentioned lands, and for the advantage of the testator's family according to his subsequent directions; and that, after the expiration of fifty years from the testator's death, the executors might be at liberty to sell the lands above mentioned for the benefit of the testator's children or their heirs lawfully begotten; and after directing *that his wife should have the use of his household goods and furniture, and stock-in-trade, and also any surplus of the rents, [*181]

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during widowhood and until the youngest child attained twenty-one or should be free from apprenticeship; and that, should any child be still under twenty-one or not free from apprenticeship at the death of the testator's wife, the executors should sell the stock-in-trade and furniture, and apply the produce in paying off the mortgage and in forming a fund for lending to the testator's children to assist them in business; and further directing that his children should be maintained out of the rents of the above-mentioned lands, till they should attain twenty-one or be free from apprenticeship; and that the profits of a colliery at Gerard's Bridge should form a further fund for lending 100*l.* a-piece to each child; and that, after the youngest child attained twenty-one, the widow was to have an annuity according to the terms therein mentioned, proceeded as follows: "And I do hereby direct and order my said executors to divide once every three years any money in hand that hath been received for and as an overplus after all the before-mentioned purposes are fully provided for, any remainder then in their hands or out at interest, equally amongst my said children, or their lawful heirs in stead of any one that may happen to be dead, share and share alike, subject nevertheless to any money lent to any one of my said children as hereinbefore mentioned, until the death or marriage of my said wife; and after the death or marriage of my said wife, once every year as hath been last mentioned and fully expressed, share and share alike, for and until the end and expiration of fifty years from the time of my death as hereinbefore is mentioned. And my will and mind is, and I do hereby direct and order my said executors, that at the end and expiration of the said fifty years, my said executors *do make sale to the best bidder of all and every my lands, tenements, hereditaments, and premises then remaining and belonging to my estate or otherwise. And so soon as the money can be received for the same, immediately to pay and discharge or divide to and amongst my said children and now living, that is, Charles, Richard, John, Thomas, and Edward, my sons, Elizabeth, Jane, and Mary, my daughters, or any of their heirs lawfully begotten in their stead; provided nevertheless should any of my said children die without lawful issue, such share or shares of those so dying to go to and belong to the survivors or their lawful heirs equally. The whole money arising by such aforesaid sale or sales to be equally divided amongst my said surviving children or their lawful heirs, share and share alike."

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The testator died in 1793, leaving his wife and eight children

surviving him, consisting of five sons, viz. Charles, Richard, John, Thomas, and Edward, and three daughters, viz. Elizabeth, Jane, and Mary. The testator had a ninth child, who died before the date of the will. Thomas died without issue and intestate in 1811. Charles died leaving children, of whom Thomas Birch Speakman was the eldest; he died before the bill was filed, leaving a son Thomas, who was a party to the cause. Charles made a will which would pass such deviseable interest, if any, as he had under the will of Thomas Speakman, the testator. Charles's children other than the eldest, and the parties interested under his will, were parties in the cause. Richard died in 1825, leaving children. He also made a will, which would pass such deviseable interest, if any, as he had under the will of Thomas Speakman, the testator. Richard's children and the parties interested under his will were parties to the cause. Jane married A. T. Ducker. *Elizabeth and Mary were unmarried. [*183] Edward the other son, and the three daughters, were the plaintiffs in the original cause. The widow of the testator died in 1814.

The fifty years, at the expiration of which the testator's property was to be divided, expired in the month of August, 1843.

The original bill was filed in June, 1844; and, in 1845, a decree was made directing inquiries, for the purpose of ascertaining the then state of the testator's family. The Master made his report under that decree; and a supplemental bill was filed to perfect the record in respect of parties, according to that report. Edward the son afterwards died, and the persons representing his interest were brought before the Court.

Mr. Walker and *Mr. Prior* for the plaintiffs, Elizabeth, Jane, and Mary, the daughters of the testator, who were living at the death of the testator, and who outlived the term of fifty years, claimed three-eighth parts of the property absolutely.

Mr. Kenyon Parker and *Mr. Selwyn* for some of the devisees of Charles, the eldest son and heir-at-law of the testator, insisted that the limitation of the property of the original testator, at the end of fifty years, was void for remoteness; and that the same vested in Charles his eldest son and heir-at-law, and passed by his will.

Mr. Bacon, *Mr. Malins*, *Mr. Elmsley*, *Mr. Follett*, *Mr. Little*, and *Mr. Milne*, for the other parties, claimed interests under the will of

SPEAKMAN v. SPEAKMAN. [*184] 1850. *Jan.* 11.

the testator, and supported the *validity of the bequests in the will at the expiration of the term of fifty years.

THE VICE-CHANCELLOR:

As it appeared to me that many of the questions to be raised in argument would be influenced by my decision as to the validity of the limitation at the end of the fifty years term, I requested that that point might be argued separately. And the argument upon all other points (that is, as to the rights of the parties during the term,) suspended until my decision was known.

It is with much regret that I have come to the conclusion, that the limitation of the property at the expiration of the fifty years' term is too remote.

In coming to this conclusion, I have not been influenced by the mere form of the direction to sell and divide at the expiration of the term. If the plaintiffs could have made good the argument of their counsel, that the property was effectually and absolutely given to the testator's children, or to certain issue of the children in their stead, to be ascertained at latest at the death of the children before the expiration of the term, and was to be sold for their benefit and divided amongst them at the expiration of the term, I should not, on account only of the form of the gift at the expiration of the term, have felt bound to consider it as contingent. But that is not the way in which this case presents itself to my mind. One suggestion at the Bar as to the disposition of the property during the term was, that I might, in the gift to the "testator's children or their heirs," read "or" as "and," and give the testator's children a vested interest in the property. Now, without adverting to some con-

[*185] sequences which might *follow upon that construction, or to the circumstance, that part of the property is personal estate, I am satisfied that the will does not admit of that construction. The gift is to the children, or to their heirs in their stead in case any of them should happen to be dead; and nothing can be more manifest than that substitution of the heirs, whatever that word may mean, for the children, and not succession, is the purpose of the testator; and the question on this will is, whether the testator has directed that substitution to take place at such time or times, and in favour of such objects, as will enable the Court to execute his direction. Another point contended for was, that I must read the word "heirs" in the sense of "children," that is, grandchildren of the testator, including more remote issue of the testator's children. In

which case it was said, that the substituted legatees must be determined at latest within the period of a life in being at the death of the testator; and, that any grandchild (though unborn at the death of the testator), to whom the property would go, would take an absolute vested interest within the period allowed by law. I cannot adopt that construction of the will. It is plain, that the word "heirs" must be read "issue;" and I cannot find a word in this will to justify me in saying, that the testator's grandchildren were objects of his bounty more than his great-grandchildren, who should happen to be born during the period of fifty years. Indeed the only ground upon which I was pressed to limit the construction of the word "heirs" or "issue" to grandchildren of the testator was, the consequence to which it would lead, viz. that it would or might lead to a decision, that the limitation at the expiration of the term of fifty years was void for remoteness. That I apprehend is not a sufficient reason for departing from the plain meaning of the testator's words. The true way of reasoning *upon a will like this is: [*186] first, to ascertain what it is that the will directs during the period of fifty years, without reference to the question whether the gift, at the expiration of the term, is good or bad; and if the direction, during the period of fifty years, can thus be ascertained, the Court is not at liberty to alter the construction of the will, for the purpose of supporting the ultimate limitation at the expiration of the fifty years; that would be to make a new will for the testator, only because the rules against perpetuities prevent his will from being carried into effect.

The remaining argument, by which I hoped at one time the will might be supported, was this, that the substitution of the heirs or issue was to be determined, once for all as regards each child's share, (whether in favour of grandchildren or more remote issue), at a time which would remove all objection to the bequest on the ground of remoteness; and several periods were suggested for that purpose: as, the death of the testator, the death of the widow, or, the death of any of the testator's children. And this appears to me to be the real question upon the will, viz. whether it directs a substitution, once for all, at some given time, not too remote, as regards each child's share, as in *Salisbury* v. *Petty* (1); or whether the will does not contain a running direction to the trustees to pay the income from time to time, during the whole period of fifty years, to the testator's children, or, in case of their deaths, to such of their lineal descendants (whether children or more remote issue,) as may from

(1) 64 R. R. 206 (3 Hare, 86).

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time to time come *in esse*. I think the latter is the true construction of the will, and that I am not at liberty to depart from it, only because it prevents me from giving effect to the ultimate disposition of the property.

[187] It must I think be admitted that the death of one of the testator's children in his lifetime, leaving issue living at the testator's death, would have been within the substitutionary clause. It is manifest also, that the case of the death of a child after the testator's death, leaving issue, would also be within the substitutionary clause; for the testator contemplates the case of the substitution taking place in favour of the issue of a child to whom money had been lent by his trustees, and such an event might happen at any time during the fifty years. The question then is, whether, in the case of such last-mentioned substitution, the Court could say, that the issue of a child living at his death should alone be entitled to share in the rents and profits, to the exclusion of issue born during the term after the death of the child. It appears to me impossible to say that such exclusion is within the words of this will; and if that be so, the persons to take at the expiration of the fifty years would not be ascertainable until the expiration of the term; or, in other words, the gift of the property at the expiration of the term would be contingent as to the persons to take.

1850.
Jan. 30, 31.
Feb. 8.

WIGRAM, V.-C.

[188]

BECKITT *v.* BILBROUGH.

(8 Hare, 188—197; S. C. 19 L. J. Ch. 522; 14 Jur. 238.)

A., an allottee of shares in a Railway Company, having executed the subscribers' agreement and Parliamentary contract, obtained the scrip certificate of his shares, which he sold, and such scrip certificate, after passing through several hands, was bought by B. The Act incorporating the Company was subsequently passed, and advertisements published, calling upon the holders of scrip certificates to register their shares. No application having been made by B., then the holder and owner of the scrip certificate, for registration of the shares which it represented, those shares were registered in the name of A. as the original subscriber, and the sealed certificate was delivered to him. A. immediately sold the shares, to avoid liability for calls; about a year elapsed, and two calls were made after the sale, and before any claim in respect of the shares was made by B.: Held, that, after the registration of the shares in the name of A., B. might have sued in equity for the transfer of the shares by A. to himself (B.), if the shares had not been sold, but had remained in A.'s name; and that it followed, that the Court had jurisdiction to compel A. to account for the purchase-money received by him for the sale of the shares.

THE defendant was the allottee of ten shares in a railway projected in May, 1845; and having signed the subscribers'

agreement and subscription contract, he received a scrip certificate, as follows:

"North Western Railway.—Scrip Certificate.

"Ten Shares, No. 40,771 to 40,780.

"This is to certify, that the holder hereof is the proprietor of ten shares of 20*l.* each in the above undertaking, on which a deposit of 1*l.* 2*s.* per share has been paid, subject to the fulfilment of the subscribers' agreement and Parliamentary contract, which have been duly executed in respect thereof.

"LANCASTER, 1st May, 1845. Entered EDMUND SHARPE.

"(Signed) E. D. SALISBURY, R. HENRI, } Provisional Directors."

The defendant afterwards, before the Act of Parliament was obtained, sold the ten shares for 52*l.*, and delivered over the scrip certificate to G. and T. Rhodes, brokers of Leeds. The shares and scrip certificate subsequently passed by sale and purchase through divers hands; and ultimately, on the 12th of September, 1845, *were purchased by the plaintiff at the price of 67*l.* 10*s.*; and the [*189] scrip certificate was thereupon delivered to the plaintiff.

The Act incorporating the Company was passed in 1846, and intituled "An Act for making a Railway from the Leeds and Bradford Extension Railway to the Lancaster and Carlisle Railway, with a diverging line therefrom to Lancaster, to be called the North Western Railway." The Company soon afterwards caused advertisements to be published, as follows:

"North Western Railway.—Registration of Shares.

"The Act for the incorporation of the North Western Railway Company having received the Royal assent, all persons holding scrip certificates for shares in this Company are requested to send the same, on or before Monday, the 14th September next, to the secretary at the Company's offices, Lancaster, accompanied by claims in the form annexed, with their names, professions, and residences distinctly written, in order that the same may be correctly entered in the register of the Company, in accordance with the Companies Clauses Consolidation Act, 1845. The receipt of the scrip certificates will be duly acknowledged; and, on the completion of the register, they will be exchanged for certificates under the seal of the Company.

"By order of the Board,

"EDMUND SHARPE, Secretary.

"Offices, Fenton Street, Lancaster,

"August 10th, 1846."

BECKITT v. BILBROUGH.

"Form of Application to the Secretary.

"SIR,—I request that you will insert my name in the register of
[*190] the shareholders in the North Western *Railway Company as a proprietor of shares, the scrip for which I send you herewith.

"I am, Sir.

"Usual signature ———— (Name at full length).
"Profession or Trade ————
"Residence ————
"Date————"

This advertisement was subsequently followed by one in the following form:

"North Western Railway.—Registration of Shares.

"Notice is hereby given, that the share register of this Company will be absolutely closed on Saturday, the 26th of September instant; after which day all shares not transmitted to me for registration will be registered in the names of the original allottees.

"By order of the Board of Directors.

"EDMUND SHARPE, Secretary.

"Company's Offices, Brock Street, Lancaster,
"September 17th, 1846."

No application having been made for registration in respect of the ten shares of which the plaintiff held the scrip certificate, the defendant's name was entered by the Company on their register as the proprietor of such shares. The defendant was informed of such registration by the following letter from the secretary of the Company:

"North Western Railway Company.
"Secretary's Office, Brock Street, Lancaster,
"13th October, 1846.

"SIR,—I beg to inform you, that scrip certificates No. 40,771 to 40,780, for ten shares in this Company, which were originally allotted to you, have not been sent in to me for registration; I
[*191] have therefore entered your name *on the register of shareholders as the proprietor of the said ten shares, the certificate of which will be forwarded to you in due course.

"I am, Sir, your obedient servant,

"MR. JOHN BILBROUGH. "E. SHARPE, Secretary."

The defendant, apprehending (as he alleged) that a call would be

soon made upon the shares thus entered in his name, instructed his broker to sell them, in order that his name might be removed from the register, and that of the transferree substituted; and they were accordingly sold at the price of 9*l.*

A further letter from the secretary of the Company was received by the defendant on the 31st of October as follows:

"North Western Railway Company.
"Secretary's Office, Lancaster,
"October 30th, 1846.

"SIR,—I beg to inform you, that sealed certificates for shares in this Company will be ready for delivery on and after the 5th of November next; you are therefore requested to fill up the accompanying form, and return it together with the office-receipt, which you hold for scrip, to &c.

"MR. JOHN BILBROUGH. "E. SHARPE, Secretary."

The defendant filled up and returned to the secretary the form which had been sent; and on the 23rd of November the sealed certificate of shares was transmitted to the defendant. A call was made of 1*l.* 8*s.* per share, amounting to 14*l.*, which the defendant paid; and the same, together with the 9*l.* purchase-money, was repaid to him by his broker, through whom he had sold *the [*192] shares; and the defendant thereupon executed the transfer to the purchaser.

The bill was filed by the plaintiff in August, 1847, stating, that he had never seen any advertisement as to the registry of shares; and that he was first informed in January, 1847, in reply to an application to the secretary of the Company, that the shares had been registered in the name of the defendant; and it set forth a correspondence, which had subsequently taken place between the plaintiff and defendant, in which the plaintiff had required the certificates to be delivered up, offering to pay the defendant the amount of the calls (if any) which he had paid. The bill prayed, that the defendant might be decreed to come to an account with and pay the plaintiff all sums of money which the defendant had received for the purchase-money, or otherwise, on account of the ten shares since the passing of the Act, together with such further sum or sums of money as he might have received, had he sold the ten shares at the highest marketable value at which the same had been since he was registered as owner thereof under the Act, the

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plaintiff being willing, and thereby offering, thereupon to pay the defendant all sums of money, if any, paid by him since his sale of the shares to the plaintiff, for or in respect of calls upon the shares, and to give such indemnity (if any) to the defendant in respect of the shares as the plaintiff was bound or ought to give.

The defendant, by his answer, set forth the circumstances under which he had been registered, and his reasons for disposing of the shares, as above mentioned; and he stated, that, in reply to the plaintiff's application respecting them, he had informed the plaintiff

[*193] *that two calls had been paid on the shares since their registry, and that he might purchase the ten shares at less than the amount of such calls; and that he had offered to purchase and transfer to the plaintiff ten shares for the amount of the calls which had been paid thereon. He submitted also, that the purchase-money received by him, being only 9*l.*, was below the amount for which the Court would entertain a suit.

Mr. Wood, and *Mr. Winstanley* for the plaintiff. * * *

[194] The *Solicitor-General* and *Mr. Elmsley* for the defendant:

[195] The VICE-CHANCELLOR said, that it having been decided at law, that the sale of the scrip certificates of shares in railways, before the incorporation of the Company, is lawful; and it having also been decided in this Court, that a contract for the purchase of a certain number of shares in a Railway Company is to be distinguished from a contract for the purchase of a certain quantity of stock, and that a party is entitled to a decree for specific performance of a contract for the purchase of railway shares,—he was of opinion, that if the ten shares in question had remained standing in the name of the defendant, the plaintiff, as the purchaser of the shares from the defendant, would have been entitled to a decree for the transfer of such shares to himself; and he thought it was a consequence of that right, in a case where such shares had been sold by the defendant, that the Court would decree the defendant to account for the purchase-money.

WINTHROP *v.* MURRAY.

1850.
Jan. 23, 25.

WIGRAM, V.-C.

[214]

(8 Hare, 214—215 ; S. C. 19 L. J. Ch. 547 ; 14 Jur. 302.)

The defendant, a creditor, agreed that judgment should not be entered up against the plaintiff, his debtor, upon a warrant of attorney, unless default should be made in the payment of the premiums of a policy of life insurance, which was effected to secure the debt; and that payment of the debt should not be required so long as the policy was kept on foot. The plaintiff permitted the time for payment of the premium to expire, and four days afterwards the defendant paid the premium, and procured the policy to be revived. The COURT refused to relieve the plaintiff against the consequence of his default in payment of the premium, and dismissed a bill brought by him to restrain the defendant from suing out execution against the plaintiff on the judgment.

THE chief object of the suit was, to restrain the defendant Murray from suing out execution on a warrant of attorney given by the plaintiff to Murray by way of security for a debt, upon an agreement that judgment was not to be entered up unless default should be made in payment of the premiums on a policy of life insurance in the Hand-in-Hand Insurance Office; and that, so long as the policy should be kept on foot, payment of the debt should not be required. It was provided by the contract, that if the plaintiff should omit to pay the premium for ten days after it became due, the defendant Murray should be at liberty to make such payment, and recover the sum so paid as against the plaintiff. The premium was payable on the 24th of June, and the notice was sent by the office to the defendant Murray, by whom the insurance had been effected, and it did not appear to have been communicated by him to the plaintiff. The thirty days allowed by the insurance office for the payment beyond the 24th of June, the date on which the premium became due, expired on the 23rd of July. On the 27th of July, Murray (who was one of the directors of the insurance office) found that the premium, which was due on the 24th of June, had not been paid; and he then procured the office to accept the payment of the premium by himself, and thus to revive the policy, notwithstanding the four days delay which had occurred. The defendant Murray then proceeded to enforce the warrant of attorney.

The *Solicitor-General* and *Mr. Elderton* for the plaintiff.

Mr. W. W. Cooper for defendants in the same interests. [215]

Mr. Wood and *Mr. Glasse* for the defendant Murray.

Mr. H. E. C. Jones for other defendants.

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Doe d. *Pittman* v. *Sutton* (1) was cited in support of the bill.

The VICE-CHANCELLOR, after adverting to the cases in which the COURT had refused to relieve against breaches of covenant, said, that, if the object of the contract was, that the defendant Murray should be protected by an uninterrupted insurance, (as he was of opinion that it was), the Court would not relieve against a breach of that contract. The question then was, whether Mr. Murray had had, according to the terms of the contract, such uninterrupted protection by the continued preservation of the interest in the policy. It appeared, that four days had elapsed after the time for payment of the premium had expired, and during which time the Insurance Company was under no obligation to continue the policy on foot. Mr. Murray was not bound to continue the plaintiff as his debtor under the contract, any longer than the plaintiff protected him by keeping up the policy. When this had ceased to be done, the defendant was at liberty to sue out execution. Had the defendant lost this right by paying the premium himself, and procuring the policy to be revived? He was of opinion that he had not; and that the circumstance, that the defendant was a director of the Insurance Company, did not alter the case.

Bill dismissed, with costs.

1850. *March* 20, 27.

WIGRAM, V.-C. [216]

DOBSON *v.* LAND (2).

(8 Hare, 216—221; S. C. 4 De G. & Sm. 575; 19 L. J. Ch. 484; 14 Jur. 288.)

A mortgagee of houses, who was not by express contract with the mortgagor entitled to insure the premises against fire at the mortgagor's expense, nor to require the mortgagor so to insure them, was not formerly entitled to add to his mortgage debt, and charge upon the property, the premiums which he might pay for such an insurance effected by him without the privity of the mortgagor.

Distinction between mortgagees and trustees (3).

A FORECLOSURE suit, brought by mortgagees in possession of the mortgaged property, which consisted of dwelling-houses, warehouses, mills, and machinery. The decree at the hearing directed the accounts to be taken. The mortgagees claimed, before the

(1) 62 R. R. 763 (9 Car. & P. 706).

(2) In mortgages made since 1881 a statutory power of insuring against fire is conferred upon the mortgagee in the absence of any contrary intention expressed in the deed. See Conveyancing and Law of Property Act, 1881, s. 19 (2).—O. A. S.

(3) *Banner* v. *Berridge* (1881) 18 Ch. D. 254, 50 L. J. Ch. 630, 44 L. T. 680; *White* v. *City of London Brewery Company* (1888) 39 Ch. D. 559, affd. 42 Ch. Div. 237, 58 L. J. Ch. 855, 61 L. T. 741.

Master, to be allowed the amount of premiums, which they had paid for the insurance of the premises against fire. The Master allowed a portion of the sums thus claimed, considering that the charge had been authorised by a provision in one of the deeds, under which part of the mortgage money was advanced. Exceptions were taken both by the mortgagors and mortgagees. The question was argued partly on the form of the security, one of the deeds containing a covenant for the insurance of the premises by the mortgagors, in the joint names of the mortgagors and mortgagees, and providing, that, if the mortgagees should pay the premiums, they might add the same to the monies secured by the mortgage. It did not, however, appear, that the insurance had been made in pursuance of the covenant, or continued in conformity with the provisions of the deed; and the decision, therefore, depended on the abstract right of a mortgagee of buildings to insure and add the premiums to his mortgage debt, in the absence of any special provision on the subject.

The case was argued by the *Solicitor-General* and *Mr. Batten* for the parties entitled to the equity of redemption.

Mr. Kenyon Parker and *Mr. Hardy* for the mortgagees; and

Mr. Wood, *Mr. Shee*, and *Mr. Torriano* for other parties.

On the part of the mortgagees it was argued, that [the mortgagee, [217] in the view of a court of equity, was a trustee for the mortgagor; and any insurance which he effected would be referred to that character; and, as such trustee and mortgagee, he would be accountable to the mortgagor for the monies which he might recover in respect of such insurance. They cited *Davis* v. *Dendy* (1), *Quarrell* v. *Beckford* (2), *Sandon* v. *Hooper* (3), *Hughes* v. *Williams* (4), *Wragg* v. *Denham* (5), *Russel* v. *Smithies* (6), *Dryden* v. *Frost* (7), *Detillin* v. *Gale* (8), *Giddings* v. *Giddings* (9), *Webb* v. *Lugar* (10), *Phillips* v. *Eastwood* (11), *Holland* v. *Smith* (12), and other cases].

For the parties entitled to the equity of redemption it was argued, [218] that there was no right in a mortgagee to charge his mortgagor

(1) 18 R. R. 209 (3 Madd. 170).
(2) 16 R. R. 214 (1 Madd. 269).
(3) 63 R. R. 72 (6 Beav. 246).
(4) 8 R. R. 364 (12 Ves. 493).
(5) 47 R. R. 366 (2 Y. & C. 117).
(6) 3 R. R. 560 (1 Anst. 96).
(7) 45 R. R. 344 (3 My. & Cr. 670).
(8) 6 R. R. 192 (7 Ves. 583).
(9) 27 R. R. 78 (3 Russ. 241).
(10) 47 R. R. 497 (2 Y. & C. 247).
(11) 46 R. R. 226 (L. & Goold, 270, 289).
(12) 9 R. R. 801 (6 Esp. 11).

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with the expense of insurance; * * that the insurance of the mortgagee was made for his own benefit, and must be at his own cost: as it was not for the benefit, neither should it be at the cost, of the mortgagor. The insurance by a mortgagee in possession was, in effect, no more than the insurance by a tenant, the expense of which he could not require repayment of by his landlord, or an insurance by a landlord, which he could not charge against his tenant. [They cited *Leith* v. *Irvine* (1), *Hare* v. *Groves* (2), *Leeds* v. *Cheetham* (3), and other cases.]

March 27.

THE VICE-CHANCELLOR:

In the absence of the policies of assurance, which have not been produced either in the Master's office or before me, the question raised by the fifth of the defendants' exceptions to the Master's report is this: *Whether, if a mortgagee of houses, not entitled by express contract with the mortgagor to insure the premises against fire at the mortgagor's expense, nor entitled to require the mortgagor to insure them against fire, thinks proper, without the privity of the mortgagor, to insure the premises against fire—whether in such a case the mortgagee is entitled, as a matter of course, to add the premiums of the policy to his mortgage debt, and charge them upon the mortgaged premises.

[*219]

In the case before me the mortgagee was entitled by contract, in certain events, to charge the mortgaged premises with the premiums of an insurance against fire; but as the policies have not been produced, I am not at present in a condition to determine whether the insurance he effected is within the terms of his contract; and I am therefore compelled at present to try the question in an abstract form.

In the absence of authority I certainly think the decision ought to be against the right of the mortgagee to make such a charge. It was admitted in argument, that, if the mortgagee had a right to make this charge, the mortgagor must have had a corresponding right to require that the sum payable on the policy in case the property had been destroyed by fire should be laid out in restoring the premises, and the question was argued upon that view of the case.

The argument was, that the mortgagee was a trustee for the mortgagor, and that he had no insurable interest in the property,

(1) 36 R. R. 319 (1 My. & K. 277).
(2) 4 R. R. 835 (3 Anst. 687).
(3) 27 R. R. 181 (1 Sim. 146).

except that which the mortgage gave him; and upon these premises the conclusion was rested, that whatever he did as mortgagee must enure to the benefit of the mortgagor, subject to the payment of the mortgage-money. In the absence of authority, I am not *prepared to adopt that conclusion. I may observe, that I do not see how the question could be affected by the circumstance that the mortgagee was in possession.

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[*220]

Now, that a mortgagee is in some sense a trustee for the mortgagor, may be admitted; for every person in whom the legal estate is vested, with a beneficial interest for another person, in a sense, is a trustee for that person. In some sense a mortgagee is in a worse position than a trustee, for a trustee in an ordinary case is not liable to a decree for wilful default, unless a special case be proved against him; whereas such a decree is merely of course as against a mortgagee in possession. On the other hand, a trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own. And other cases of a like kind might be put. This destroys the integrity of the proposition contended for by the mortgagee; and I confess I have great difficulty in seeing why a mortgagee should not, as between himself and the mortgagor only, be allowed to make any contract he pleases, collateral to and not affecting the mortgaged premises. Just as a lessor or lessee may insure the leasehold property against fire, without giving the other any interest in the policy. Questions may arise with the insurance offices, but that is foreign to the matter in hand.

Two cases however were cited, which, it is said, were authorities in support of the claim of the mortgagee. These cases were *Ex parte Andrews, In the Matter of* *Emmett (1), and *Baldwin* v. *Banister* (2). With respect to the former Sir JOHN LEACH certainly, in the first part of his judgment, uses expressions favourable to the claim of the mortgagee; but ultimately he declines deciding the case upon that ground, and rests his judgment upon the ground of trust. And upon looking at the case, it will be found that the transaction was, in form, a trust and not a mortgage. The other case is, I admit, more difficult to be got over. It might be distinguished from the present case, upon the ground that the

[*221]

(1) 2 Rose, 410.

(2) 3 P. Wms. 251, *n.* (*a*).

DOBSON v. LAND.

transaction in question was a dealing with the mortgage property itself. But I do not think that is a distinction in principle. The case is very shortly stated; and no light is thrown upon it by the Registrar's book, to which I have referred. Neither the arguments of counsel nor the judgment of the COURT appear. I cannot deny that I consider that case an authority adverse to my own views; but I cannot follow it, without deciding, in effect, that a mortgagee is to all intents and purposes a trustee for the mortgagor, and subject to the same rules by which the Court restrains persons filling a fiduciary character from having any dealings for their own benefit. The principle upon which that doctrine is founded does not apply to the case of mortgagor and mortgagee; and I have already shown that it is not so applied by the Court.

The case was referred back to the Master, without any order being made on the exception on this point.

1849.
April 24, 26, 27, 28, 30.
May 1, 2, 3, 4, 5, 22, 23, 24, 25, 26.
Nov. 6.

WIGRAM, V.-C.

[222]

REYNELL *v.* SPRYE.

(8 Hare, 222—278; affd. 1 D. M. & G. 660; 21 L. J. Ch. 633.)

The defendant became acquainted with the fact, that, under the will of a relation of the plaintiff, an estate vested in trustees was settled (after a subsisting life estate, and upon the failure of issue of the tenant for life, who had then no issue,) to the plaintiff for life, with remainder to his issue in tail, with remainders over, and an ultimate remainder to the plaintiff's brother (then deceased), and his heirs and assigns; the defendant having communicated to the plaintiff (who was then supposed to be, and was in fact, the heir-at-law of his brother) the existence of such a will, in a long correspondence produced an impression on the mind of the plaintiff, contrary to the true facts, that the plaintiff's interests under the will were precarious; that they were endangered by the conduct of the trustees and tenant for life, and could not be established without difficulty, delay, and litigation; and the defendant obtained a conveyance of a moiety of the estate from the plaintiff, the defendant indemnifying the plaintiff against the costs of recovering the property. The COURT set aside the conveyance; and held, that it was not an objection to this relief, that the plaintiff had, throughout, the means, equally with the defendant, of knowing what his rights were, and of obtaining competent advice respecting them.

A plaintiff may be entitled to relief from a contract or conveyance on the ground of ignorance and mistake, although the defendant with whom he dealt, and against whom relief is sought, was also in ignorance and under mistake,—the contract or conveyance not being made upon the principle of compromising doubtful rights.

Where a conveyance of a moiety of an estate was made by A. to B., upon a representation first made to A. by B., that such moiety was to be the remuneration of the lawyer for recovering the estate, and, upon a subsequent representation, that such moiety had been made over to him, B.; the circumstance that such representations as to the remuneration for

professional services, and as to the transfer to B., were untrue, was held to be a ground for setting aside the conveyance.

REYNELL v. SPRYE.

Where property is in the hands of trustees for the parties entitled to it, and there is no adverse claim after the death of the parties in possession,—a communication to one of the cestuis que trust in remainder of his interest in the property, is not a consideration upon which a conveyance of a portion of the property can be sustained, as the sale of a secret; for, in such a case, the disclosure is a nullity.

The defendant having taken a conveyance in fee from the plaintiff of an estate, which the plaintiff would not be able so to convey except as heir-at-law of his deceased brother, and a suit having been brought by the plaintiff against the defendant to set aside the conveyance on the ground of fraud, and continued by the devisee of the plaintiff after his decease, the absence of proof that the plaintiff was such heir-at-law, and therefore that his devisee had any interest in the estate, was held not to be an objection to a suit, which it was open to the defendant to raise.

A conveyance of one moiety of an estate being set aside, a contract for the sale of the other moiety to the same party, based on the previous conveyance of the first moiety, cannot be supported.

[AFFIRMED on appeal, as reported in 1 D. M. & G. 660.]

CLAY *v.* RUFFORD.

1849. *Dec.* 14, 15, 17, 18.

(8 Hare, 281—291; S. C. 19 L. J. Ch. 295; 14 Jur. 803.)

WIGRAM, V.-C.

[281]

[THIS suit was subsequently re-heard, and a report of the re-hearing will be found in 5 De G. & Sm. 763.]

MARKER *v.* KEKEWICH (1).

1850. *May* 8.

(8 Hare, 291—300; S. C. 19 L. J. Ch. 492; 14 Jur. 544.)

WIGRAM, V.-C.

[291]

BY settlement estates were limited to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, or by demising, mortgaging, or selling the estate (except the mansion-house), for all or any part of the term, or by all or any of the said ways or any other reasonable ways, to raise 30,000*l.*, and pay the same to the parties therein mentioned: Held, that, as between the tenants for life not impeachable for waste and the remaindermen, the *corpus* of the estate must bear the charge; and that the interest of the charge must be paid by the tenant for life in possession, who in the meantime was entitled (as part of the profits of the estate) to the timber, which, as such tenant for life, he had a right to cut.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think fit; and it does not follow, that, because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it.

To a bill by one of the successive tenants for life under the limitation,

(1) *In re Marquis of Bute* (1884) 27 Ch. D. 196, 53 L. J. Ch. 1090.

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against the trustees of the term and the tenant for life in possession, to restrain the trustees from raising the 30,000*l.* by sale or mortgage of the estate, until the timber of full growth (of which it was alleged that a large quantity was standing on the estate,) had been cut and applied towards that purpose, demurrers were allowed.

By an indenture of the 16th of October, 1844, Margaretta Marker, [*292] in consideration of her natural love and *affection for her sons and their issue, and her daughter, conveyed to Sir J. Kennaway and R. Stephens, and their heirs, certain manors, messuages, and lands, in Somerset, Devon, and Dorset, including the mansion and grounds of Combe, in Devonshire, to the use of S. J. Kekewich and J. Pulman, for a term of one thousand years, without impeachment of waste, save only the cutting and felling of ornamental timber as thereinafter mentioned; and, subject to such term, to the use of Margaretta Marker the settlor, for her life, without impeachment of waste, save as aforesaid; remainder to the use of Henry William Marker for life without impeachment of waste, save as aforesaid; with remainder to the use of Henry William Putt Marker for life without impeachment of waste, save as aforesaid; remainder to the use of the first son of the body of Henry William Putt Marker, and the heirs male of the body of such first son; and for want of such issue to the use of the second, third, and every other son of the body of the said Henry William Putt Marker, severally and successively, and the heirs male of the body and respective bodies of such son and sons; and for want of such issue to the second, third, and every other son of the body of Henry William Marker, severally and successively, and the heirs male of the body and the respective bodies of such son and sons; and for want of such issue to the use of Thomas John Marker for life without impeachment of waste, save as aforesaid; remainder to the use of Richard Marker, the eldest son of Thomas John Marker, for life without impeachment of waste, save as aforesaid; with remainder to the use of the first and other sons of Richard Marker in tail male; remainder to the use of John Marker, the second son of Thomas John Marker, for life without impeachment of waste, save as aforesaid; with divers remainders over, and the ultimate remainder to the use of Henry William Marker in fee.

[293] The declaration of the trusts of the term was in these words: "Upon trust, in the first place, by cutting and felling, and selling, and converting into money all or any part or parts of the timber now standing and growing on the said lands, which is or shall be of full and ripe growth, and not ornamental to the mansion at Combe aforesaid, or the pleasure grounds attached thereto, or any of the views or prospects of the same; of which timber it is

hereby declared, that enough of the most ornamental shall always remain to preserve the beauty of the place unimpaired; or by demising, mortgaging, or selling the premises comprised in the said term or any part or parts thereof (save and except the mansion house at Combe aforesaid, and the said several manors, messuages, farms, advowsons, rectories, lands, hereditaments and premises, situate, lying, or being in the said several parishes of Gittisham, Fairway, Hinton, and Buckerell, or any or either of them, all of which are hereby expressly reserved from sale), and for all or any part of the said term, or by all or any of the said ways or means, or any other reasonable ways or means, forthwith to levy and raise the clear sum of 10,000*l.*, and to pay the same to the said Margaretta Marker, her executors, administrators, or assigns, or as she or they shall order and direct, for her and their own absolute benefit; and in the next place, from and immediately after the decease of the said Margaretta Marker, by all or any of the ways and means aforesaid, to levy and raise two several sums of 10,000*l.* and 10,000*l.*, and to pay the first of those two several sums of 10,000*l.* each, unto the said Thomas John Marker, his executors, administrators, and assigns, for his and their absolute benefit, and to be by him and them received in satisfaction of any claim he may have on his brother, whether legal or otherwise, under the codicil to the last will and testament of his uncle the Rev. Thomas Putt, deceased; and *to pay and apply the last of the two several [*294] sums of 10,000*l.* each, to such persons and in such manner as Margaret Frances Smith, the wife of the Rev. G. Townsend Smith, formerly Margaret Frances Marker, shall by any writing under her hand appoint, order, and direct, and in default thereof, unto her the said Margaret Frances Smith, her executors, administrators, and assigns, for her and their absolute benefit, together with interest on the two last-mentioned sums of 10,000*l.* and 10,000*l.*, to be computed at 4*l.* per cent. per annum from the day of the decease of the said Margaretta Marker, until the full payment thereof respectively." And the said indenture provided, that, from and immediately after the trusts thereinbefore declared of and concerning the said term of one thousand years should in all respects be fully performed, or otherwise satisfied or discharged, or should become unnecessary or incapable of taking effect, and the said S. T. Kekewich and James Pulman, and their executors, &c., should be fully reimbursed and satisfied all the costs, charges, and expenses to be occasioned by or relating to the trusts thereby in them

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reposed, the said term should, as to such of the manors, capital and other messuages, farms, lands, advowsons, and other premises comprised therein, as should not have been sold or mortgaged for the purposes aforesaid, absolutely cease and determine, and, as to such of the said premises as should have been so mortgaged, should, subject to such mortgage, wait upon and attend the reversion and inheritance of the said premises so mortgaged.

Margaretta Marker, the settlor, died in October, 1844, having by her will appointed her son, the said Henry William Marker, her sole executor, and who then also became the tenant for life in possession of the settled estates. He had no issue male. Henry William Putt Marker died in 1849, without issue.

[295] Richard Marker, the eldest son of Thomas John Marker, and the tenant for life next in succession in the limitations after the preceding life estate of his father, the existing life estate of Henry William Marker, and the estate tail in the second and other sons of Henry William Marker, in March, 1850, filed his bill by his next friend (he being an infant) against the trustees of the term; Henry William Marker, the tenant for life in possession, who was also, as the executor of Margaretta Marker, entitled to one of the sums of 10,000*l.*; Thomas John Marker, the plaintiff's father, who was entitled to another of the sums of 10,000*l.*, and was also the tenant for life in priority to the plaintiff; John Marker, the brother of the plaintiff, and the next tenant for life in succession to him; and G. T. Smith and Margaret Frances his wife, the parties entitled to the remaining sum of 10,000*l.* The bill charged, that the trustees ought to proceed to raise the three sums of 10,000*l.*, by cutting and selling the timber of ripe and full growth, not being ornamental, so far as the same would extend in the first place, and then by a sale or mortgage of a competent part of the estate; but that they intended, and the defendant Henry William Marker alleged that they ought, to raise the same by sale or mortgage of a competent part of the estate, without resorting to the timber, unless in case of a deficiency of the proceeds of such sale or mortgage. The bill alleged, that there was upon the estate sufficient of such timber to raise 7,000*l.* and upwards; that the estate comprised in the term was much more than sufficient to raise the entire 30,000*l.*; but if the same were wholly raised by mortgage, the inheritance would be unnecessarily burdened, and the defendant Henry William Marker would be benefited at the expense thereof, by being enabled to fell and sell the timber, and apply the proceeds to his own use. The bill prayed a

declaration of the Court, to the effect that the parties *interested in remainder and reversion under the settlement were entitled to have such timber cut and sold, and the proceeds applied towards payment of the 30,000*l.*, and that the remainder thereof only should be raised by such sale or mortgage; and it prayed an injunction to restrain the trustees from raising by sale or mortgage more than the deficiency of the said three sums, after the proceeds of the timber should have been applied; and also to restrain the defendant Henry William Marker from felling the timber, or appropriating it to his own use. [*296]

The defendant Henry William Marker, the tenant for life in possession, and Kekewich and Pulman, the trustees of the term, severally demurred to the bill.

The *Solicitor-General*, *Mr. Lloyd*, and *Mr. Giffard*, for Henry William Marker; and *Mr. Roundell Palmer* and *Mr. Amphlett*, for the trustees, in support of the demurrers.

Mr. Wood and *Mr. Sandys*, for the plaintiff, relied principally on the declaration of the trusts of the term, that the charges should "in the first place" be raised by means of the timber.

The following cases were cited: On the refusal of the COURT to assume the exercise of a discretionary power given to trustees, even in cases where the trustees had failed or declined to exercise it: *Maddison* v. *Andrew* (1), *Cowley* v. *Hartstonge* (2), *Burges* v. *Lamb* (3), *Penny* *v. *Turner* (4), *Fordyce* v. *Bridges* (5). On the nature or extent of the control which the Court would exercise over powers vested in trustees: *Brown* v. *Higgs* (6). On the manner in which the Court would regulate or marshal the interests of the several parties entitled to the timber and the inheritance, where the timber had been applied in satisfaction of debts or incumbrances in the case of a tenant for life not impeachable for waste: *Davies* v. *Wescomb* (7); and where the timber had been severed in the case of a tenant for life impeachable for waste: *Tooker* v. *Annesley* (8). And on treating timber either as in the nature of rents and profits or as part of the inheritance: *Ferrand* v. *Wilson* (9). [*297]

THE VICE-CHANCELLOR:

My opinion as to the proper conclusion to be come to upon these

(1) 1 Ves. Sen. 57.
(2) 14 R. R. 86, 91 (1 Dow, 361, 378).
(3) 10 R. R. 150 (16 Ves. 174).
(4) 78 R. R. 158 (2 Ph. 493).
(5) 78 R. R. 161 (2 Ph. 497).
(6) 4 R. R. at p. 337 (8 Ves. 570).
(7) 29 R. R. 128 (2 Sim. 425).
(8) 53 R. R. 64 (5 Sim. 235).
(9) 67 R. R. 70, 85 (4 Hare, 344, 373, 374).

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demurrers has undergone no change from the moment I felt that I was in possession of the real question raised by the pleadings. In order to explain my views, the case must be noticed under two different aspects: First, as between the parties entitled to the charges created by the settlement of the 11th of October, 1844, on the one side, and the persons entitled to the estates subject to the charges on the other; and secondly, as between the tenant for life of the estates subject to the charges on the one side, and the parties entitled in remainder on the other.

The former of these questions may be dismissed with a passing
[*298] observation. It is only for the sake of giving *distinctness to the latter question that it requires even such an observation. It is admitted on all hands that the parties entitled to the charges have *primâ facie* a right to have those charges raised in the manner most beneficial to themselves. The limits, if any, of this right must be found in the obligation which this Court in some cases imposes, in compelling parties to exercise their paramount rights in the manner least injurious to others, as (for example) in the case of marshalling assets, and some cases of contribution. The argument, therefore, in this case was properly confined to the latter question.

It was said for some of the demurring parties, that the trustees had an unlimited discretion to raise the charges in such way as they thought fit; and that, if their discretion were but honestly exercised, the Court would leave the charges to be finally borne by those parties upon whom the mere act of the trustees might chance to throw it; and the case of *Brown* v. *Higgs* (1), and other cases of that class were cited in support of the argument. It was this argument which for the moment embarrassed me. I felt satisfied that it could not be sound; and assuming that the case of the defendants might require my adoption of the argument, I did not at once see my way to the conclusion that I am about to state. If the argument were right, the trustees, by postponing the raising of the charges until after the death of the tenant for life, might throw the whole burden of principal and interest upon the inheritance; or, by entering into possession of the estates in the first instance, and collecting the rents and profits, including the timber which the tenant for life *sans* waste might cut, they might deprive the tenant for life of all
[*299] benefit under *the settlement; or, by pursuing the course which it is the object of this bill to restrain, namely, by raising the charges immediately by sale or mortgage, they might apportion the charges

(1) 4 R. R. 323 (8 Ves. 561).

between the tenant for life and remainder-man in proportion to their respective interests in the estates. It is impossible that I can ascribe so capricious an intention to the settlor unless the words of the settlement imperatively require it. Now, nothing can, in my opinion, be more clear than the intention of the settlor in this case as expressed in the settlement. She intended that her estates in the first instance should be subject to certain charges in favour of the persons to whom those charges are given; and, subject to the charges, she has given her estates to a tenant for life unimpeachable for waste, with remainders over. All else in the settlement relating to the manner of raising the charges, is mere machinery for carrying out the intentions I have described. It follows, that, as between the tenant for life and the remainder-man, the tenant for life must pay the interest of the charges, and the *corpus* of the estate must bear the charges upon it. The tenant for life, in the meantime, is entitled, as part of the profits of the estate, to the timber, which a tenant for life not impeachable for waste has a right to cut, as between himself and the remainder-man.

As the course about to be pursued by the trustees will do that which as between the tenant for life and remainder-man I think is right, I need not say what course the Court would take at the hearing of the cause, if a different course had been pursued by the trustees. The case cited from Simon's Reports (1) is, I think, an authority in favour of this view of the question. The demurrers, *therefore, must be allowed in the usual way, unless the costs have been made a matter of arrangement between the parties.

[*300]

BIRD *v.* LUCKIE (2).

1850. *June* 14, 15, 27.

(8 Hare, 301—310; S. C. 14 Jur. 1015.)

KNIGHT BRUCE, V.-C. [301]

A testator, after bequeathing his residuary estate to trustees, upon trust for his grandson, the child of his deceased daughter, for his life, directed them, in case his grandson should die under twenty-one without issue, then to pay the rents and profits unto and amongst his (the testator's) "next of kin, in such proportions and manner as is provided by the Statute of Distributions," and in case the grandson should die after attaining twenty-one without leaving issue, or such issue should die under twenty-one, or unmarried, or without issue, then to distribute the whole of the residue amongst such next of kin in the same proportions and manner; Held, that the gift was to the next of kin of the testator at his death; and this, notwithstanding his sole next of kin, at the time of making the will, and at the time of his death, was the grandson of the testator, to whom the life-estate was given, and the sole next of kin of the grandson at the same times

(1) *Davies* v. *Wescomb*, 29 R. R. 128 (2 Sim. 425).

(2) *Harris* v. *Newton* (1877) 46 L. J. Ch. 268.

MARKER v. KEKEWICH.

demurrers has undergone no change from the moment I felt that I was in possession of the real question raised by the pleadings. In order to explain my views, the case must be noticed under two different aspects: First, as between the parties entitled to the charges created by the settlement of the 11th of October, 1844, on the one side, and the persons entitled to the estates subject to the charges on the other; and secondly, as between the tenant for life of the estates subject to the charges on the one side, and the parties entitled in remainder on the other.

The former of these questions may be dismissed with a passing
[*298] observation. It is only for the sake of giving *distinctness to the latter question that it requires even such an observation. It is admitted on all hands that the parties entitled to the charges have *primâ facie* a right to have those charges raised in the manner most beneficial to themselves. The limits, if any, of this right must be found in the obligation which this Court in some cases imposes, compelling parties to exercise their powers, and securities to least injurious to others, as [illegible] benefit of the said Edward (1) Rawlins assets, and some cases, administrators, and assigns, and thence-in this case would receive the rents and profits of the said residuary

It would pay the surplus thereof, after satisfaction of the annuities, to Edwin Rawlins Withers, until none of the annuitants should be left surviving; and then to pay the whole of the net rents and profits to Edwin Rawlins Withers during his life. And the testator declared that in case Edwin Rawlins Withers should have issue, then, but not otherwise, he (Edwin Rawlins Withers) should have full power to appoint, give, or bequeath the said residuary estate unto and among such issue as he should direct; and that the said trustee should, upon the death of Edwin Rawlins Withers, and of the last surviving annuitant, transfer all such
[*302] residue to such issue, upon *him, her, or them attaining twenty-one or marrying, but not before; and in case Edwin Rawlins Withers should die without having made any such appointment or disposition, leaving such lawful issue, the testator directed that his trustee should assign the whole of the said residue unto and among such issue of Edwin Rawlins Withers, in equal proportions. And the will proceeded, "And in case the said Edwin Rawlins Withers shall die under the age of twenty-one years without lawful issue, then upon trust, that he, the said Charles Freeth, his executors, administrators, or assigns, do and shall pay and apply the surplus

(1) [This mistake is repeated in the judgment, p. 300 below.]

between the tenant for life and remainder-man in proportion to their respective interests in the estates. It is impossible that I can ascribe so capricious an intention to the settlor unless the words of the settlement imperatively require it. Now, nothing can, in my opinion, be more clear than the intention of the settlor in this case as expressed in the settlement. She intended that her estates in the first instance should be subject to certain charges in favour of the persons to whom those charges are given; and, subject to the charges, she has given her estates to a tenant for life unimpeachable for waste, with remainders over. All else in the settlement relating to the manner of raising the charges, is mere machinery for carrying out the intentions I have described. It follows, that, as between the tenant for life and the remainder-man, the tenant for life must pay the interest of the charges, and the *corpus* of the estate must bear the charges upon it. The tenant for life, in the meantime, is entitled, as part of the profits issue. ...te, to the timber, which a tenant for life not impeachable for

Edwin Rawlins W... between himself and the remainder-man. the time of making his will and co... by the trustees will do that death. The defendant, George Withers, ...ainder-man I think is Rawlins Withers, as the heir-at-law and personal ...uld take at the Edwin Rawlins *Withers, claimed the residuary es...d by the testator under the devise and bequest in the will to his nea... ...n kin; and the surviving brothers of the testator, and the children of a sister, who would have been the next of kin of the testator at the time of his death, if Edwin Rawlins Withers had not been living, and who became such next of kin upon the death of Edwin Rawlins Withers, claimed such residuary estate under the same devise and bequest.

Mr. Walker and *Mr. Kenyon Parker*, for the plaintiffs, the executors, and for the trustee.

Mr. Wood, *Mr. Bacon*, *Mr. Lloyd*, *Mr. Glasse*, *Mr. J. H. Palmer*, and *Mr. Surrage*, for the brothers of the testator and the children of his sister.

The *Solicitor-General* and *Mr. Prior*, for the father and personal representative of Edwin Rawlins Withers.

The points taken in the argument are all adverted to in the judgment. The following cases, which are arranged in the order of their occurrence, were cited: *Holloway* v. *Holloway* (1), *Jones* v.

(1) 5 R. R. 81 (5 Ves. 399).

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Colbeck (1), *Doe* d. *Garner* v. *Lawson* (2), *Miller* v. *Eaton* (3), *Bird* v. *Wood* (4), *Briden* v. *Hewlett* (5), *Clapton* v. *Bulmer* (6), *Urquhart* v. *Urquhart* (7), *Booth* v. *Vicars* (8), *Seifferth* v. *Badham* (9), *Say* v. *Creed* (10), *Bradley* v. *Barlow* (11), and *Ware* v. *Rowland* (12).

[304] THE VICE CHANCELLOR:

In the circumstances of this case it is impossible to be surprised at the dispute which has arisen as to the meaning of the words "unto and amongst my next of kin in such proportions and manner as is provided by the Statute of Distributions," and the words "unto and among my said next of kin in such proportions and manner as aforesaid," contained in the will of Mr. Rawlins, the testator in the cause. On one side it is said, that the next of kin intended must be considered as having been the person or persons (whether one only or several) who should be the testator's next of kin at the time of the testator's death; for the word "then" which precedes (though not immediately) each passage, is said to refer to an event and not to time; and there is nothing, it is contended, in the context to change the ordinary meaning of the words "next of kin," or to make them descriptive of a class to be ascertained otherwise than at what is alleged to be the usual time, namely, the decease of the testator. On the other side it is said, that the context alone, or aided by extrinsic facts, shows that the next of kin intended must have been the person or persons who should happen to be the testator's next of kin at or immediately after the time of the death of Edward Rawlins Withers, or the time of the death of the survivor of the testator and Edward Rawlins Withers, or the time of the failure of Edward Rawlins Withers' issue.

Now, supposing the will, either alone or with the codicil, to be read without reference and without regard to any extrinsic fact, to any extrinsic state of circumstances, I apprehend that the right construction of the words in question must be the first suggested: that is, the next of kin meant must be held to be the person or persons
[*305] answering the description of the testator's next *of kin at the time of the testator's death. So much is, I think, clear. The mere circumstance that the gift to the next of kin was not immediate but was

(1) 6 R. R. 207 (8 Ves. 38).
(2) 7 R. R. 454 (3 East, 278).
(3) 14 R. R. 259 (G. Coop. 272).
(4) 25 R. R. 238 (2 Sim. & St. 400).
(5) 39 R. R. 146 (2 My. & K. 90).
(6) 51 R. R. 287 (10 Sim. 426; 5 My. & Cr. 108).
(7) 60 R. R. 416 (13 Sim. 613).
(8) 66 R. R. 1 (1 Coll. 6).
(9) 73 R. R. 392 (9 Beav. 370).
(10) 71 R. R. 238 (5 Hare, 580).
(11) 71 R. R. 244 (5 Hare, 589).
(12) 78 R. R. 228 (2 Ph. 635).

contingent upon a future event, which might not or might happen, being insufficient to render the description applicable only to such person or persons as should happen to form the class at the time of the occurrence of the event, the context having nothing, as I conceive, to make it so applicable, and neither of the instruments disclosing the fact of Edwin Rawlins Withers having been the person who would have taken the testator's whole personal estate, had he died intestate at the time when he made his will or when he made his codicil; and if we were to suppose invalidity in the testator's, or his daughter's, marriage to be shown to have existed, so as to exclude lawful relationship between him and his grandson, and this state of things to have been known to the testator when he made his will, the consequence must, in my opinion, be the same; that is, the next of kin intended must, I apprehend, be held to be the next of kin at his death.

But do the extrinsic facts actually established by the evidence, as it truly stands, make any difference? They are these: the testator had not, when the will was made, or afterwards, a wife or any child living. He had had a daughter, who married George Withers, mentioned in the will, and by him had a son, Edwin Rawlins Withers, also mentioned in the will, to whom I have before alluded. Edwin Rawlins Withers was, when the will was made, and continued to his death, to be the only living descendant of the testator. Edwin Rawlins Withers and George Withers both survived the testator, who must be taken to have known, when he made his will, the state of his family at the time. The testator, when he made his will, and also when he made his *codicil, and also at his death, had collateral [*306] kinsmen living, of whom some were nearly related and well known to him. But, of course, at each period, Edwin Rawlins Withers was the testator's sole next of kin, and at each period George Withers was Edwin Rawlins Withers' sole next of kin. Edwin Rawlins Withers never was married. He was a minor when the testator died. Such being the facts, it is impossible to deny plausibility at least to the argument, that the testator, by the expression "next of kin," did not mean the person who was his next of kin at the time of making the will or the codicil, or the person or persons who should be his next of kin at the time of his death. These facts, however, do not show the testator's language to have been senseless or absurd, or contrary to law, if understood otherwise than as contended by that argument. Nor can a bequest by a widower of all his property to his grandson, being his sole descendant, for life, and afterwards to

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the children of the tenant for life, if any, absolutely, but if no child, then to the tenant for life, absolutely, although he is a minor, although he is not the testator's only near relative, and although the minor's nearest relative is a stranger in blood to the testator, be justly termed eccentric, capricious, or prodigiously improvident, in the absence of special circumstances rendering such a disposition in the particular case, or on particular grounds, censurable. But if it could be so, still, no man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able [*307] to answer most satisfactorily. And *this is one among the reasons that may be and have been judicially given, against readily attributing to men mistakes in the language that they use in their wills, and against departing from the proper sense of their words, without something more than conjecture, without something more than the mere opinion of the interpreter, however wise he may be, that the language, construed according to the rules of idiom, would make an eccentric or inconvenient provision,—reasons which may not always have been adhered to, which may possibly be at variance with some particular instances of construction now of settled application in some particular cases, but which, I apprehend, are generally true and sound.

Having on the present and former occasions considered the authorities cited at the Bar, and so far as I am aware every printed authority from *Marsh* v. *Marsh* (1) downwards, whether as to real or as to personal estate, bearing directly or importantly on a question of this species, I cannot represent myself as satisfied that they can all be reconciled together, that some are not substantially inconsistent with others. Two of the least important are *Godkin* v. *Murphy* (2) and *Booth* v. *Vicars* (3), both decided by myself, if, indeed, they are of any importance at all. Nor should I have mentioned them, but for the purpose of saying, that though not satisfied of the incorrectness, I have some doubt of the correctness of these two decisions. Certainly I do not dissent from what Mr. Justice DAMPIER said in the case of *Driver* v. *Frank* (4), where

(1) 1 Br. C. C. 293.
(2) 2 Y. & C. C. C. 351.
(3) 66 R. R. 1 (1 Coll. 6).
(4) 15 R. R. 385, 389 (3 M. & S. 25, 31).

he thus expressed himself: "If a testator expresses an intention precisely, in clear and positive terms, and there is no legal objection to it, no *inconvenience arising from a literal adherence to such intention, so expressed, is to be regarded. The case is very different where the intention is not fully expressed, but is to be collected and inferred as only probable. In that case, the probability, from which the intention is to be inferred, may be outweighed by the improbability that the testator could intend to make a distribution of his property, attended with such inconveniences as would follow from carrying into execution his supposed intention. But strong as a conjecture may be that such was the intention, Lord HARDWICKE in *Lomax* v. *Holmden* (1) says, 'Whatever the intention is, if there are not words in the will to warrant it, either express or implied, it cannot have effect.' And Lord MANSFIELD, in *Fen* v. *Lowndes* (2), speaking of the testator whose will he was then construing, says, 'though this was manifestly his intention, I was extremely afraid there were not words enough to warrant us to put this construction upon it.' And in a case before this Court in Easter Term, *Doe* d. *Hick* v. *Dring* (3), the COURT held that real estate did not pass by the words 'all and singular my effects of what nature or kind soever,' though it could not be well doubted, on the facts of that case, that the testator meant to dispose of the whole of his property." And I assent also generally to what Lord ELLENBOROUGH, when disagreeing in his conclusion from the rest of the COURT on that occasion (4), said in these terms—"supposing the intention upon the face of the will to be clear, it is difficult to say what words, by which such intention is clearly expressed, or from which it is manifestly and with certainty to be implied, are not also capable of giving effect to it. When I speak of certainty, I must be understood to speak of moral certainty, the only certainty which relates to this subject, *and hardly any certainty upon any moral subject can be predicated which does not admit some degree of mere possibility to the contrary" (5).

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[*309]

It may be said, that to construe the will according to the contention of the administrator of Edwin Rawlins Withers, is to allow in effect no operation to the gift to the next of kin, as the testator was, when he made his will, and remained, a widower. This remark may be of weight in some cases. I can conceive the

(1) 1 Ves. Sen. 294.
(2) 4 Burr. 2250.
(3) 15 R. R. 308 (2 M. & S. 448).
(4) *I.e.* in *Driver* v. *Frank*.
(5) 3 M. & S. 50.

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possibility of a question of construction turning on the point that words in one sense are superfluous and inoperative, and in another operative and efficient. But applied to a will such in character, and containing such limitations, as the present, the observation has, I think, no weight.

It has been argued forcibly, that the reference in the will to a plurality, or possible plurality of persons, as the testator's next of kin, is decisive, or very strong against George Withers' claim. I do not, however, agree to this. I do not see why it should be supposed, that when the testator made his will, or made his codicil, he contemplated as impossible to happen, in his lifetime, any event which was then possible to happen in his lifetime, though in fact it did not. Now, of course, Edwin Rawlins Withers might have died in the testator's lifetime, leaving or not leaving issue. Certainly it was, both in 1839 and 1841, possible, and I do not suppose it was prodigiously improbable, that the testator's next of kin at his death might be two or more persons (descended or not descended from the testator), whose shares of his personal estate, if he had died intestate, might have been equal or unequal.

[310] On the whole, the extrinsic facts do not appear to me such as to render it necessary or safe to construe the will differently from the manner in which, without proof of them, it would have been right to construe it; and, therefore, I must read "next of kin," as meaning next of kin at the testator's death; a conclusion at which I have arrived, not very willingly, the effect being to take the bulk of his property from his family in a manner that it may be fairly conjectured he would himself be disposed to prevent, if he could have a voice in the matter; but we are allowed to hear him only through his will and codicil.

IN THE QUEEN'S BENCH.

REG. *v.* THE DEAN AND CHAPTER OF ROCHESTER (1).

1851.
April 26, 30.

[1]

(17 Q. B. 1—34; S. C. 20 L. J. Q. B. 467; 15 Jur. 920.)

King Henry VIII. founded by charter the Cathedral Church of Rochester, to consist of a Dean and six Prebendaries, and he made certain statutes for their government. By statute 26, a master was to be chosen by the Dean and Chapter, to teach certain poor boys who, by the same statute, were to be instructed in the Cathedral: and the master, if found negligent or unfit, was to be removed. By statute 35, if any officer, of a description including the master, committed a slight offence, he was to be corrected at the discretion of the Dean; if a weighty offence, he was to be expelled by those who gave him his admission. By statute 38, the Bishop of Rochester for the time being was appointed visitor, to see that the statutes and ordinances were observed, and with full power to convene and interrogate the Dean, canons, minor canons, clerks and other officers, on the articles contained in the statutes, and all other things touching the welfare and honour of the Cathedral Church, to punish ascertained offences according to their degree, and reform them, and to do all things which might seem necessary to the extirpating of vices and which pertained to the office of a visitor.

W., a schoolmaster appointed under statute 26, published a pamphlet, on Cathedral Trusts, accusing the Dean and Chapter of having misappropriated the Cathedral revenues of Rochester to their own benefit and the injury of poor persons entitled to share in them, and imputing to the then Bishop, formerly Dean of Worcester, that he had been guilty of similar misconduct as Dean, and had, as visitor, culpably, and with knowledge of the facts, omitted to correct it in the Dean and Chapter of Rochester. The Dean and Chapter removed W. from his office for this publication and the reflections upon the Dean and Chapter and the Bishop, therein contained, pronouncing him guilty of a grave offence, and unfit to be continued in the office of master. They, however, under counsel's advice, revoked the dismissal, but immediately afterwards cited W. to answer before them for the same offence: and they afterwards dismissed him again for the same publication.

A *mandamus* having issued to restore W., the Dean and Chapter made a return, and W. pleaded several pleas. The facts appeared on the record as above stated. The return alleged that W. had been removed, to wit for lawful cause, and had not appealed to the visitor. W. pleaded that the Bishop had an interest in the cause of removal which disqualified him from acting as visitor; and by another plea he justified the publication, and denied that he was lawfully dismissed. On demurrer to the pleas, Held,

1. That the Bishop (if not interested) was the proper visitor in this case, for that statute 35 did not withdraw it from the general authority given to the visitor by statute 38, and the Dean and Chapter did not exercise a visitatorial authority in dismissing the master.

2. That the Bishop had not such an interest as disqualified him from acting as visitor.

3. That the prosecutor, therefore, should have appealed to the visitor,

(1) Foll. *R.* v. *Rand* (1866) L. R. 1 Q. B. 233, 35 L. J. M. C. 157; *Hayman* v. *Rugby School* (1874) L. R. 18 Eq. 78, 43 L. J. Ch. 834; cited, *R.* v. *Sunderland Justices* [1901] 2 K. B. 357, 373, 70 L. J. K. B. 946, 85 L. T. 183, C. A.—A. C.

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and not proceeded by *mandamus:* And that, assuming the dismissal to have been improper, this Court was not authorized to interfere on the alleged ground that the Dean and Chapter were acting in excess of their jurisdiction.

MANDAMUS, directed to the Dean and Chapter of the Cathedral
[*2] Church of Christ and the *Blessed Virgin Mary of Rochester. The writ suggested that Robert Whiston, clerk, was duly qualified for, and duly elected, nominated, appointed, licensed, allowed, sworn and admitted to and into the place and office of head master of the Grammar School of or annexed to the said Cathedral Church, created, founded, established and endowed under and by virtue of certain letters patent of Henry VIII., in which place and office he always behaved and governed himself well and according to the statutes and ordinances made for the management, ordering, direction and government of the head master for the time being of such school: yet defendants, without any reasonable cause, and contrary to the said letters patent, statutes and ordinances, have unjustly removed the said R. W. from the said place and office, in contempt &c., contrary to the statutes and ordinances for governing the said Grammar School, and to the great damage &c. of the said R. W. The writ commanded the defendants to restore or cause to be restored the said R. W. to the said place and office and the full
[*3] exercise and enjoyment thereof, *together with all the liberties, privileges &c. thereunto belonging; or show cause &c.

Return. That, before and at the time of the making of the letters patent after mentioned, King Henry VIII. was seised in his demesne as of fee, in right of his Crown of England, of divers lands in Rochester in the county of Kent in the said letters patent more particularly mentioned, the same lands having theretofore been the site of a certain Convent or Monastery of the Church of Saint Andrew the Apostle of Rochester; and, being so seised, the said late King afterwards, to wit on 18th June, 33 Hen. VIII., by his letters patent under the Great Seal, and then made to the tenor and effect following of and concerning the said Convent or Monastery and of and concerning the said lands, founded and established, amongst other things, a certain Cathedral Church, viz.: The return then set forth the charter, by which Henry VIII. founded the Cathedral Church, to consist of a Dean and six Prebendaries, who were to be a body corporate, and to be called the Dean and Chapter of the said Cathedral Church; and the King by the same charter ordained that the said Cathedral Church should for ever be the Episcopal see of the Reverend Father &c. Nicholas Heath and his

successors, Bishops of Rochester. And his Majesty granted the site of the old monastery, with divers chattels, buildings, lands &c. formerly belonging thereto, to the Dean and Chapter *in puram et perpetuam eleemosynam*. The Dean was to have the power of appointing the inferior officers of the Cathedral, and of correcting and expelling them: saving to the King the right of nominating, on vacancy, the Dean, six Prebendaries, *and six poor men to be supported by the Royal bounty. [*4]

The return then stated that, after the making of the letters patent, the King, in the 36th year of his reign, by indenture then made in pursuance of a provision in the said letters patent, made, specified and declared divers ordinances, rules and statutes of and concerning the premises in the said letters patent mentioned, to the tenor and effect following, viz. &c. The return then set forth the statutes. Those material to the present case were as follows.

4. *Officio Decani.*

Quoniam decanum vigilantem esse decet, veluti oculum in corpore qui reliquis corporis membris haud negligenter prospiciat, statuimus et volumus ut Decanus qui pro tempore fuerit cum omni solicitudine præsit, canonicos cæterosque ministros Ecclesiæ omnes moneat, increpet, arguat, obsecret, opportunè importunè instet, tanquam excubias agens in reliquum gregem suæ curæ commissum: curet autem ut divina officia cum decoro celebrenter, ut conciones præscriptis diebus habeantur, ut pueri cum fructu instituantur, ut eleemosynæ pauperibus distribuantur, ut in universum concredita sibi munera singuli fideliter obeant. Præterea Decani interesse debet ut cum præsens fuerit honestam et competentem familiam alat, pauperibus panem frangat, quâ in re ipsius conscientiam oneramus ut honestè et frugaliter in omnibus se exhibeat. Decanum autem insigniter miserum castigabit Episcopus: canonicos vero insigniter miseros castigabit Decanus, qui etiam malos et in officio tardos per statuta corriget atque puniet. Præterea thesaurum, *jocalia, Ecclesiæ ..... supellectilem omnem ..... chartas et [*5] munimenta ..... aliaque bona et res quascunque ad Ecclesiam prædictam spectantes, absque ullâ illorum diminutione aut damno (salvo eorum rationabili usu), ... diligenter ac fideliter dispenset, disponat ac custodiat, atque ab aliis quorum interierit illud agere dispensari, disponi ac custodiri faciat, ut ea omnia successori suo integra relinquat. Denique statuimus et volumus ut in omnibus causis gravioribus, veluti in feodi concessione, terrarum dimissione, et aliis id genus, Decani si præsens fuerit consensus

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obtineatur; qui si fuerit absens, modo intra regni nostri Angliæ limites degat, consensus ejus requiratur.

Statute 25 directed that there should be eight choristers, for whose instruction, tam morum modestiâ quàm canendi peritiâ, there should be elected, by the Dean (or the Vice Dean in the Dean's absence) and Chapter, a clerk, duly qualified and sworn, who, si negligens aut in docendo desidiosus inveniatur, post trinam monitionem ab officio deponatur.

26. *De Pueris Grammaticis et eorum Informatoribus.*

..... Statuimus et ordinamus ut ad electionem et designationem Decani, aut, eo absente, Vice Decani, et Capituli, sint perpetuò in Ecclesiâ nostrâ Roffensi viginti pueri pauperes et amicorum ope destituti, de bonis ecclesiæ nostræ alendi ..... Atque hos pueros volumus impensis Ecclesiæ nostræ ali, donec mediocrem Latinæ grammaticæ notitiam adepti fuerint, cui rei dabitur quatuor annorum spatium ..... Statuimus prætereà ut, per Decanum, vel, eo absente, Vice Decanum, et Capitulum, unus
[*6] eligatur Latinè et Græcè doctus, *bonæ famæ et piæ vitæ, docendi facultate imbutus, qui tam viginti illos Ecclesiæ nostræ pueros quam alios quoscunque Grammaticam discendi gratiâ ad Scholam nostram confluentes pietate excolat et bonis literis exornet. Hic in Scholâ nostrâ primas obtineat, et Archididasculus sive præcipuus informator esto ..... (Direction is then given for the election, also by the Dean and Chapter, of an under master.) Hos verò informatores puerorum volumus ut regulis et docendi ordini quem Decanus et Capitulum præscribendum duxerint diligenter ac fideliter obsecundent. Quòd si desidiosi aut negligentes aut minus ad docendum apti inveniantur, post trinam monitionem à Decano et Capitulo admoneantur, et ab officio deponantur. Omnia autem ad functionem suam spectantia se fideliter præstaturos Juramento promittent.

35. *De Corrigendis Excessibus.*

Ut in Ecclesiâ nostrâ morum integritas servetur, statuimus et volumus ut si quis minorum canonicorum, clericorum, aut aliorum ministrorum, in levi culpâ deliquerit, arbitrio Decani aut, eo absente, Vice Decani corrigatur. Sin gravius fuerit delictum, (si justum judicabitur) ab iisdem expellatur a quibus fuit admissus. Si quis autem canonicorum in offensâ aliquâ aut crimine unde Ecclesiæ nostræ grave scandalum oriri possit culpabilis inventus fuerit, is per

Decanum aut, eo absente, Vice Decanum, admoneatur. Quòd si tertiò admonitus se non emendaverit, apud Episcopum visitatorem suum accusetur, et illius judicio corrigatur. Pauperum verò, quoties deliquerint, correctionem Decani, aut, eo absente, Vice Decani, judicio reservamus, qui si incorrigibiles permanserint, per Decanum cum capituli Consensu *a nostrâ Ecclesiâ expellantur et omne in eâ emolumentum perdant. [*7]

38. *De Visitatione Ecclesiæ.*

Nullum opus est adeò piè cœptum, adeo prosperè productum, adeofidelitur consummatum, quod non facilè subruatur ac incuriâ et negligentiâ subvertatur; nulla tam sancta et firma statuta conduntur quin temporis diuturnitate in oblivionem et contemptum veniant, si non adsit continua vigilantia et pietatis zelus: Quod quidem ne in Ecclesiâ nostrâ unquam fiat aut evenire possit, nos, Episcopi Roffensis qui pro tempore fuerit fide ac diligentia freti, eundem Ecclesiæ nostræ Cathedralis Roffensis Visitatorem constituimus, volentes ac mandantes ut pro Christianâ fide et ardente pietatis zelo vigilet et gnaviter curet ut hæc statuta et ordinationes Ecclesiæ nostræ à nobis editæ inviolabiliter observentur, possessiones et bona tam spiritualia quam temporalia prospero statu floreant, jura, libertates et privilegia conserventur et defendantur. Atque, ut hæc ita fiant, statuimus et volumus ut Episcopus ipse, quoties a Decano vel a duobus canonicis rogatus fuerit, imò, licet non rogatus, semel tamen quovis triennio, ad Ecclesiam nostram in personâ propriâ, nisi grandis obstiterit necessitas, alioquin per cancellarium suum, accedat, Decanum, canonicos, minores canonicos, clericos, cæterosque omnes Ecclesiæ nostræ ministros in locum congruum convocet. Cui quidem Episcopo, presentis Statuti vigore, plenam concedimus potestatem et auctoritatem ut super singulis articulis in statutis nostris contentis, et quibuscunque aliis articulis statum, commodum aut honorem Ecclesiæ nostræ concernentibus, Decanum, canonicos, minores canonicos, cæterosque ministros et cogat et eorum *quemlibet per juramentum Ecclesiæ præstitum [*8] veritatem dicere de omnibus delictis et criminibus quibuscunque. Comperta autem et probata, juxta delicti et criminis mensuram, puniat Episcopus, atque reformet, omniaque faciat quæ ad vitiorum resecationem necessaria videbuntur, quæque ad Visitatoris officium de jure pertinere dinoscuntur. Quos quidem omnes, tam Decanum quam canonicos, et alios Ecclesiæ nostræ ministros, quoad omnia præmissa volumus et mandamus ipsi Episcopo parere et obedire.

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Statuimus autem, in virtute juramenti Ecclesiæ nostræ præstiti, ut nemo contra Decanum aut canonicos aut aliquem ministrorum Ecclesiæ nostræ quicquam dicat et enunciet nisi quod verum crediderit, aut de quo publica vox vel fama circumlata fuerit. Volumus præterea ut Decanus, communibus Ecclesiæ nostræ sumptibus, Episcopo visitanti, octoque personis comitato, unam aut ad summam duas refectiones, intra Ecclesiæ nostræ ædes preparet et apponat. (Provision is then made for referring any dispute on the construction of the statutes to the Archbishop of Canterbury: and the visitor and all others are forbidden to establish new or dispense with existing statutes.) Inhibemus etiam Decano et Canonicis Ecclesiæ nostræ ne hujusmodi statuta recipiant, sub pœnâ perjurii et amotionis perpetuæ ab Ecclesiâ nostrâ. Reservamus tamen nobis et successoribus nostris plenam potestatem et auctoritatem statuta hæc mutandi, alterandi, et, si videbitur, etiam nova condendi.

The return then made averments to show that the recited statutes were among those statutes of Cathedral and Collegiate Churches which are confirmed by stat. 6 Ann. c. 21, s. 1. And it stated that, [*9] from the time *of the making of the said statutes hitherto, the Bishop of Rochester for the time being has been, under and by virtue of the said statutes and the said letters patent, the visitor of and in respect of the said Cathedral Church, as in the same statutes mentioned: That the said Robert Whiston was elected head master under and by virtue of the said statutes and not otherwise: that the school was the same school in the said statutes mentioned: that the letters patent mentioned in the writ are those mentioned in the return: And that, the said R. W. having been before the issuing the said writ removed from the said Cathedral Church and from his said office or employment of head master as aforesaid, to wit for lawful cause in that behalf, he the said R. W. has not appealed to the Bishop of Rochester for the time being, as it was lawful for him to do if he had so thought fit: and that, before and at the time of the said removal, and of issuing the said writ, the Right Reverend George Murray, by Divine permission Lord Bishop of Rochester, was, and thence hitherto has continued to be, and is, the Bishop of Rochester.

Plea 1. As to so much of the return as relates to the removal of R. Whiston for lawful cause: that the cause for which he was so removed from the said Cathedral Church and from his said office or employment of head master was not a lawful cause in that behalf in manner and form &c. Conclusion to the country.

Plea 2. As to so much of the said return as relates to the said R. W. not having appealed to the Bishop of Rochester: the said R. W. says and repeats all the averments in the next succeeding plea hereinafter contained, so far as the same relate to the cause of removal of the said R. W. in the next succeeding plea mentioned, *as if they were herein repeated; each and every of which averments, [*10] and each and every of the facts, matters and things averred by those averments, the said R. W. here avers to be true. And the said R. W. says that the matters and things in the said pamphlet averred, meant and intended to be implied and understood, were and are true. And that the said cause of removal in the next succeeding plea mentioned, (viz.) the writing, printing and publishing of the pamphlet therein mentioned, by the said R. W., in manner and form as in the same plea mentioned, is the said cause of removal in the said return alleged as the cause of removal of the said R. W. from his said office of head master, as in the said return mentioned, and not any other or different cause whatsoever. And that there never was any cause for the said removal of the said R. W. other than the said writing and causing to be printed and published the said pamphlet by the said R. W. as in the same plea mentioned. That the Bishop of Rochester mentioned in the said pamphlet, and the Bishop of R. mentioned in the said plea, is one and the same person, and was at the time of the said writing, printing, &c., and thence continually hitherto has been, and still is, the Bishop of Rochester for the time being to whom it is alleged in the said return that it was lawful for the said R. W. to have appealed; and the same Bishop of Rochester was formerly the Dean of Worcester in the said pamphlet mentioned, as and when in the said pamphlet mentioned, and is the person therein mentioned as having combined in his own person the offices of Dean of Worcester and Bishop of Rochester: and that all the matters and things contained in the said pamphlet which relate to the alleged improper application of the funds of the said Cathedral Church of *Worcester [*11] were written and caused to be printed and published by the said R. W. as aforesaid of and concerning the said Bishop of Rochester as such former Dean of Worcester as aforesaid. And that the words of the said pamphlet, next hereinafter mentioned and set forth, viz.

"Still we must not compassionate the boys at Canterbury too much, some pity is wanted for the forty at Worcester, who are in a worse plight. Instead of 2*l.* 13*s.* 4*d.* they get only 5*s.* 10*d.* each,

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for 2*l.* 2*s.* 6*d.* is taken from each boy and given to the second master, and 5*s.* more is further alienated as taken from them and given to the head master. The result of which is, that the head master has a less stipend than the second, and that the forty boys at Worcester, instead of being maintained at the costs and charges of the Church, get 5*s.* 10*d.* each; and yet the income of the late Dean of Worcester was raised from 100*l.* to 1,486*l.* 11*s.* 9*d.*, and that of each Prebendary from 20*l.* to 626*l.* 3*s.* 1*d.*, while the 2*l.* 13*s.* 4*d.* was cut down to 5*s.* 10*d.* Surely then the forty boys of Worcester may join the fifty at Canterbury, and, in the language of the Chapters of England, 'urge the manifest injustice of taking from one what is his, and giving it to another whose it is not;' unless indeed they prefer the heathen moralist, and quote their Cicero, and say of the transfers or 'conveyances' by which they suffer, 'Quid aliud est aliis sua eripere, aliis dare aliena?' As for myself, I will not venture to express what plain dealing and plain speaking men will think and say of such doings by dignitaries of the Church, one of whom, having once combined in his own person the offices of Dean of Worcester and Bishop of Rochester, has, in the latter capacity, been formally called upon, as he is by a solemn obligation required, to enforce the observance of statutes identical with those which he had, as Dean of a Cathedral, himself neglected to 'maintain,' even though 'a solemn oath was administered to him on his admission, binding him to maintain these statutes to the utmost of his power;' neglect indeed which might well provoke the Bishop of London to declare that he was 'unable to understand how certain parties, who insisted so strongly on the stringent nature of his oath as Bishop, should as Deans and Prebendaries have found it so easy to loosen the obligation of their own.'"

were written, and caused to be printed and published by R. W., of and concerning the said Bishop of R. for the time being, and of and concerning the conduct of the said Dean and Chapter of Worcester during the time that the said Bishop of R. was such Dean
[*12] of Worcester as aforesaid, *in and with such sense and meaning as follows, viz. &c. The plea then recited the same passage with innuendoes, applying several expressions above set forth (and among others the words "late Dean of Worcester," and "one of whom," and "certain parties") to the Bishop of Rochester. It then gave, with innuendoes, a further extract from the pamphlet in which, after other reflections on the Bishop, statute 38, *De Visitatione Ecclesiæ*, was recited, and the writer proceeded:

"Clearly, then, Henry VIII. did not intend that the privilege and duty of visitation should be a name and delusion, but something real, practical and substantial, securing for all wrongs effectual and speedy redress in a 'Court at home,' and providing against all abuses the correction if not the prevention of a friend, a protector and a Judge. But the Bishop of Rochester" (meaning the said Bishop of Rochester) "has not been so; he did not interfere in 1839, when" &c.

The passage went on to impute neglect of duty to the Bishop as visitor in several instances, and, among others, in the case of an appeal by the defendant himself; adding:

"When a visitor refuses to hear and determine an appeal duly made to him, common law points out the remedy, a *mandamus* of the Court of Queen's Bench, to compel him; but no one would desire to extort a decision from an unwilling Judge" (meaning the said Bishop of Rochester), "who has himself been a party to any thing like what the complainant appeals against" (meaning that the said Bishop of Rochester had, as the fact was, been guilty, as such Dean of Worcester, of improper conduct similar to that imputed in and by the said pamphlet to the said Dean and Chapter of Rochester). "I do not wish to do so," &c.

The plea then averred that defendant wrote and published the pamphlet with the intent and for the purpose of thereby showing, as the fact was and is, that the Deans and Chapters of various Cathedral Churches in this kingdom, including the Dean and Chapter of Rochester, and the Dean and Chapter of Worcester during *the time the said Bishop of Rochester was Dean of [*13] Worcester, have not, respectively, duly or properly applied, expended or disposed of the revenues of the said Cathedral Churches respectively, according to the statutes or intentions of the respective founders. That the facts alleged, set forth or referred to in the said pamphlet in support or explanation of such charges of misappropriation or misapplication of revenues by the said Dean and Chapter of Worcester are of the same nature and character as the facts therein alleged, &c., in support or explanation of the like charges against the said Dean and Chapter of Rochester. That the said Bishop of Rochester was such Dean of Worcester as aforesaid within the space of six years now last past. That defendant so wrote and published the said pamphlet and the said words so hereinbefore set forth with the intention of attributing to the

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Dean and Chapter of Worcester, during the period that the said Bishop was such Dean of Worcester as aforesaid, the same identical neglect and improper conduct with respect to the said Cathedral Church of Worcester, and in, about and with respect to the management, disposal and application of the said funds and endowments relating thereto, as are charged or imputed against or to the said Dean and Chapter of Rochester with respect to the said Cathedral Church of Rochester, and in, about &c. the said management &c. and misapplication of the funds and endowments relating thereto; and that all the matters and things in the said pamphlet contained, condemnatory of the conduct of the said Dean and Chapter of Rochester in relation to the matters concerning them, as in the said pamphlet set forth, were and were intended to be equally condemnatory of the conduct of the said Bishop as such

[*14] *Dean of Worcester as aforesaid in relation to the matters concerning the said Dean and Cathedral Church of Worcester as in the said pamphlet set forth: All which matters and things, so written &c., of and concerning the said Dean and Chapter of Worcester, were true in substance and fact, and were so written, &c., with the intent and in the manner in the said next succeeding plea mentioned; of all which the said Bishop of Rochester for the time being, before and at the time of the said removal of the said R. W. in the said return mentioned, and at the time of the making the said return, had notice: That divers passages in the said pamphlet contained were written and published with the intention of imputing to the said Bishop, as visitor of the said Cathedral Church of Rochester, a knowledge of the misapplication of the funds and violation of the statutes of the said Cathedral Church by the said Dean and Chapter of Rochester, as well as a community of actions and proceedings with the said Dean and Chapter in the matter of the said appeal of the said R. W.; and that the said Dean and Chapter have alleged and declared under the common seal of the said Cathedral Church that they removed the said R. W. from his said office in consequence of his having written and published in the said pamphlet passages (untruly alleged to be) scandalous and libellous, and directed as well against the Dean and canons of the said Cathedral Church as against the Bishop of the diocese, and likewise against the Deans and canons of other Cathedral Churches.

That, by reason of the said several premises, the said Bishop of Rochester for the time being had at the time of the said removal of R. W., and from thence hitherto continually has had, and still has,

such an interest in the *said cause of removal as to disqualify him from acting as such visitor as aforesaid: and that, by reason of the premises, the said R. W. ought not, nor was he bound or required by the said letters patent, &c., and statutes, or otherwise by law, nor was it necessary or proper for him according to the true intent and meaning of the said letters patent &c., or otherwise according to law, nor could he nor ought he, to have appealed or to appeal to the said Bishop in order to obtain redress in respect of the said removal or of the said cause of the said removal or otherwise, in manner and form as in the said return alleged. Verification. [*15]

Plea 3 stated the election and admission of R. Whiston by the Dean and Chapter to the office of head master; that he accepted and entered upon the same, and continued in it till his removal after mentioned; averments of R. W.'s good conduct and ability, and desire to continue in the office, and denial of his having been guilty of any grave offence in morals or in manners, or otherwise, within the meaning of the words "*gravius delictum*" in the statute *De corrigendis excessibus*, or the meaning of any of the other said letters patent, statutes, &c.; or of any offence or supposed offence except as after mentioned. The plea then made specific averments of certain alleged facts referred to in the after mentioned pamphlet, and imputed to the Dean and Chapter, in substance, that they had not made proper allowances to the scholars and students, and had unduly increased their own emoluments. It then stated that defendant had represented to them that the statutes, &c., were not complied with in respect of the allowances to the scholars and students, and requested them to augment the said allowances, but that they had neglected and *refused to do so: that he thereupon [*16] appealed to the Bishop of Rochester, requesting him to cause such augmentation to be made (of which appeal he gave notice to the Dean and Chapter); but that the Bishop "wholly neglected and refused to enter, enquire or adjudge upon or into the matters referred to or contained in the said appeal, or other the premises:" And that, afterwards, viz. on 26th May, 1849, he caused to be printed and published a pamphlet of and concerning the premises, entitled "Cathedral Trusts and their fulfilment," being the book referred to in the two deeds poll after mentioned, and which book was in the words and figures following. The plea then set out the whole pamphlet, and added several averments, applying and verifying the statements contained in it, and declaring that he at the time of

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publication believed them to be true, and still believes so: that they were and are subjects of public talk and rumour; that he, at the said time, believed that he might lawfully and without violation of the said statutes or breach of his duty as head master publish the same, and hoped that his doing so would produce correction of abuses: And it averred that the publishing of the said pamphlet was for the public good; and that defendant would have forborne to publish, or would have withdrawn or corrected, any of the statements, if he had been reasonably informed that they were inaccurate; of all which &c. (notice to the Dean and Chapter).

That, afterwards, viz. on 28th June, 1849, the said Dean and Chapter, at a meeting of the said Dean and Chapter in Chapter then assembled, did, against the will of the said R. Whiston, and by reason of a supposed offence alleged by the said Dean and Chapter to have been committed by the said R. W. by reason of
[*17] *his having so written and caused to be published the said pamphlet, resolve and order that the said R. W. be forthwith amoved, removed, deprived and displaced of and from the said office of head master, and of and from all houses, lands, profits &c. to the said office belonging &c. And that, after the making of the said order and resolution, viz. on the day and year last aforesaid, the said Dean and Chapter, against the will of the said R. W., made a certain deed poll of them the Dean and Chapter, sealed with their seal, bearing date &c., and delivered a copy of the same to the said R. W. The deed was then set forth, commencing as follows.

"To all to whom these presents shall come, the Dean and Chapter" &c. "send greeting. Whereas Robert Whiston, clerk, M.A., master of the Grammar School of the said Cathedral Church, has lately written, and caused to be printed and published, a pamphlet entitled 'Cathedral Trusts and their fulfilment,' of which the scope and tendency are to cast odium on the Dean and Chapter of the said Cathedral Church and the Dean and canons thereof individually, and to hold them up collectively and individually to the reproach and contempt of the subordinate members of the Cathedral, the inhabitants of the city and her Majesty's subjects in general, and which pamphlet contains many scandalous and libellous passages directed against the Dean and Chapter of the said Cathedral Church and the Dean and canons thereof individually, and also against the Lord Bishop of the Diocese, the visitor of the said Cathedral Church, and likewise against the members of divers other Cathedral Churches; particularly at page 42, where the Dean

and Chapter of the said Cathedral Church of Rochester are charged with a violation of ordinances all of which they have solemnly sworn to observe, and with suppressing, to their own profit, offices and payments meant for the benefit of the poorer members of their Cathedral: And at page 43 the following words: 'Not only do the Dean and Chapter of Rochester disregard the statutes, and loosen the obligation of the oaths for which so much reverence has been professed, but they also violate the law:' And at page 49, after setting forth the words of the respective oaths of the Dean and canons, the writer proceeds: 'Such are the oaths taken by the Dean and canons of Rochester: and I assert that, after taking them, and after pleading the statutes and ordinances of their founder, and although bound to keep the latter, every individual member of the Chapter by the strongest and most sacred ties, they notwithstanding continue to swell their dividends by disregarding *their statutes and loosening the obligation of their oaths: this [*18] assertion, a very grave and serious one, I shall prove in detail hereafter:' And at page 92, in treating of the stipends of the foundation scholars, the writer observes: 'In one case only, that of Durham, has even an approximation been made to the fulfilment of this duty; in all the rest it has been entirely disregarded, and, in the cases of Canterbury, Worcester, Ely, and Rochester (till 1842), under aggravated circumstances of malversation:' And at page 93, after stating that the cases of Ely and Rochester have been pre-eminently bad, and quoting from a declaration said to have been signed by an existing Canon of Rochester for his brethren, the writer proceeds in the following terms, speaking especially of the Dean and Chapter of the said Cathedral Church of Rochester: 'It is not, I think, too much to say that such acts with such words are "contra fidem, contra jusjurandum, contra rempublicam."' And, at page 100, the writer proceeds and alleges: 'such was the state of things in 1831 and 1834; and I feel that I am not using language too harsh in affirming that the then apportionment of the Cathedral funds between the Chapters and their schools displays (except at Westminster) a disregard of justice and a preference of money to principle, which in ordinary cases of trust would be visited with the severest reprobation if not with the penalty of restitution; but the trustees in this case are dignified and beneficed clergymen,'" &c. (The deed recited more of the same passage, and another from page 102, the language and imputations in which were similar to those in the passages above set forth.) "And whereas the laws of

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this realm provide a remedy for any wrong or grievance that may exist, and do not permit any many openly to vilify the character of another, or to impute to him wicked motives and intentions: And whereas the said R. W., master " &c., " by writing and causing the above pamphlet to be printed and published, has been guilty of a very grave offence, and, in the judgment of the Dean and Chapter, has proved himself to be utterly unfit and unworthy to be any longer entrusted with the instruction and superintendence of the foundation boys of their Grammar School, and the said Dean and Chapter in Chapter duly assembled have resolved that he is unfit and unworthy to continue in the office of master of the Grammar School of the said Cathedral Church of Rochester, and that he hath by such his misconduct as aforesaid forfeited all the rights " &c. " of that office, and have resolved and ordered that he be forthwith amoved, removed, deprived and displaced of and from the office of master of the said Grammar School, and of and from all houses, lands, profits," &c. " to the said office in anywise incident, belonging or appertaining: Now know ye that we, the Dean " &c. " have, by and with our whole and mutual assent, consent and agreement, deprived, amoved, removed and displaced, and by these presents for ourselves and our successors do deprive, amove," &c. " the said R. W. of and from the said office" &c., "and of and from all houses, lands, fees, stipends " &c. " to the said office and place incident, belonging," &c. " In witness " &c.

[19] The plea then averred that the Dean and Chapter did afterwards dispossess and amove R. W. for no other cause than that alleged in the deed. That afterwards, viz. 11th August, 1849, they gave him a written notice that, by the advice of counsel, they had cancelled the deed, and did not intend to proceed further under it, and that they did, at the time then present, acknowledge and recognize R. W. as the head master. And they further informed him that they intended forthwith to serve him with a citation to answer the charge of having, contrary to the statutes of the said Cathedral Church, and to his duty as a minister thereof, written and published a pamphlet entitled " Cathedral Trusts and their fulfilment," containing false and scandalous imputations on the Dean and canons of the said Cathedral Church collectively and individually, and of other Cathedral Churches in this kingdom; and that they would be ready to hear his defence at such time and in such manner as in the instrument of citation should be expressed.

The plea went on to allege that R. W. was reinstated in the said

office, and that, while he was such head master, viz. on 10th October, 1849, the Dean and Chapter in Chapter assembled, without the leave &c., and against the will, of R. W., and without any just, lawful or proper process or proceeding, issued, taken or pursued by the Dean and Chapter in that behalf, "did adjudge and determine: That the said R. W., then being such head master of the said school as aforesaid, and as such one of the ministers of the said Cathedral Church, had been guilty of a great offence by writing and causing to be published the said pamphlet as aforesaid, and had thereby rendered himself liable and amenable to the *penalties, [*20] punishments and deprivation which the said Dean and Chapter of the said Cathedral Church were by the said statutes or any of them, and especially by the statute *De corrigendis excessibus*, or by any other power or authority whatsoever, authorized or empowered to inflict, and that he the said R. W. had thereby proved himself to be unfit and unworthy to be entrusted with the instruction and superintendence of the foundation boys of the said school, and unworthy to be continued in the said office of head master of the said school or in the receipt or enjoyment of the advantages, privileges and emoluments of the said office; and the said Dean and Chapter, so then in Chapter assembled, did then, without the leave and licence and against the will of the said R. W., and without any just, lawful or proper process or proceeding issued, taken or pursued by the said Dean and Chapter in that behalf, further adjudge, order and determine that the said R. W. should in due course be amoved from and deprived of the said office of head master of the said Grammar School of the said Cathedral Church, and the advantages, privileges and emoluments thereof." And the Dean and Chapter afterwards, viz. on 19th October, 1849, made and executed, and delivered to R. W., a certain other deed poll under their common seal, bearing the last mentioned date, and in the words and figures following &c. The deed was then set out.

It began, "To all" &c. (as before), and recited that R. W. had been duly cited and summoned, by an instrument of citation under the common seal of the Dean and Chapter dated 13th August, 1849, to appear before them in Chapter assembled, on 14th September, 1849, to answer, in manner in the said instrument expressed, *the [*21] charge of having written and caused to be published a certain pamphlet entitled &c., containing divers passages of a scandalous and libellous nature, reflecting on the said Dean and Chapter in general, and on the individual members in particular, as in

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the said instrument was particularly expressed. The deed then went on:

"And whereas several proceedings have, since the 14th day of September, 1849, been had in the matter of the said citation; and whereas, at a Chapter holden on the 10th day of October, 1849, the said Dean and Chapter of the said Cathedral Church, having proceeded to the examination and investigation of the several statements, and charges in the said instrument of citation contained, and having duly and fully examined, investigated and considered the same, and also the several editions of the said pamphlet in the said instrument of citation mentioned, and having seen office copies of the several affidavits of the said R. W. sworn in the cause now depending between the said R. W. as plaintiff and the said Dean and Chapter as defendants in the High Court of Chancery, did, by virtue and authority of the statutes of the said Cathedral Church, some or one of them, and especially the statute entitled *De corrigendis excessibus*, and by virtue of all other lawful power and authority whatsoever enabling them the said Dean and Chapter of the said Cathedral Church for the maintenance of good order and discipline therein and amongst the several members and ministers of the same, adjudge and determine that the said R. W., then being such head master of the said school, and as such one of the ministers of the said Cathedral Church, had been guilty of a grave offence by writing and causing to be published the said pamphlet, and had thereby rendered himself liable and amenable to the penalties, punishments and deprivations which the said Dean and Chapter of the said Cathedral Church were by the said statutes or any of them, and especially by the said statute '*De corrigendis excessibus*,' or by any power or authority whatsoever, authorized or empowered to inflict, and that he had thereby proved himself to be unfit and unworthy to be entrusted with the instruction and superintendence of the foundation boys of the said school, and unworthy to be continued in the office of master of the said school or in the receipt or enjoyment of the advantages, privileges and emoluments of the said office: and the said Dean and Chapter then in Chapter assembled did further adjudge, order and determine that the said R. W. should in due course be amoved from and deprived of the office of head master of the Grammar School of the said Cathedral Church, and the advantages, privileges and emoluments thereof: Now know ye that we, the Dean and Chapter" &c.: "have, by our whole and mutual assent, consent and agreement, deprived,

*amoved, removed, displaced and expelled, and, by these presents, for ourselves and our successors, do deprive," &c. "and expel, the said R. W. of and from the office and place of upper or head master" &c., "and of and from all and every other office, place or ministry in the said Cathedral Church, and of and from all houses, lands," &c. "In witness" &c. [*22]

The plea then averred that the supposed offence in respect of which the first mentioned resolution and the secondly mentioned deed poll were made was the same with the offence mentioned in the first mentioned deed poll and the secondly mentioned resolution, viz. the said writing, printing and publishing of the said pamphlet, and is the supposed cause of removal alleged in the return of the Dean and Chapter, and not other or different; and that there never was any other cause for such removal: that the removal mentioned in the return is the removal set forth in the secondly mentioned deed poll, and no other &c.: and that the Bishop of Rochester in the pamphlet and deeds poll mentioned was formerly the Dean of Worcester as and when in the said pamphlet mentioned, and was during all the time aforesaid, and still is, the Bishop of Rochester for the time then and now being. Verification.

Demurrer to each plea, assigning causes, which it is not necessary to set forth here. (See p. 322, note (5), *post.*) Joinder.

The demurrer was argued in this Term (1).

Sir F. Kelly, for the defendants:

First, the record shows that there is a visitor; an appeal lies to him; and this Court, therefore, has not jurisdiction to enquire *into the propriety of the dismissal: *Philips* v. *Bury* (2), *Dr. Walker's* case (3). By the statutes, 26, *De pueris Grammaticis* &c., and 35, *De Corrigendis Excessibus*, the body (that is the Dean and Chapter) which elects the master has power to dismiss him: and the functions of the visitor, if the Dean and Chapter do wrong, are pointed out by the statute 38, *De Visitatione Ecclesiæ*. The powers vested in them and in the visitor, respectively, are the same as in the *Chester* case (4), which is an authority for the defendants on this point, and shows also that the return cannot be objected to if [*23]

(1) April 26th, 1851; before Patteson, Wightman, and Erle, JJ. (Lord Campbell, Ch. J. was at the Criminal Court of Appeal.) And April 30th; before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

(2) Skin. 447. Judgment of Lord HOLT in *S. C.*, 34 R. R. 134 (2 T. R. 346).

(3) Ca. K. B. temp. Hard. 212.

(4) *Reg.* v. *Dean and Chapter of Chester*, 81 R. R. 949 (15 Q. B. 513).

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it does not state precisely the cause of amotion. Should the Court think differently on this last point, the defendants are prepared to show that sufficient ground of removal appears by the pamphlet as set forth: otherwise its contents need not be discussed. It will be contended, however, that the visitor is disqualified in this case, because the publication which caused the dismissal reflects on him as well as on the Dean and Chapter. The prosecutor thus avails himself of his own wrong. It is as if, in a libel, he had reflected upon all the Judges of this Court, and therefore contended that the Court could not take cognizance of a proceeding against him for the libel.

(PATTESON, J.: If a servant libelled me, and his master dismissed him for it, and the servant brought an action for the dismissal, could not I try the cause?)

If this objection be removed, it results from the authorities that the proper jurisdiction is in the visitor; and that opinion was expressed in a former stage of this case (1) by WIGRAM, V.-C., who said: "If [*24] *there be a visitor whose powers are not so circumscribed as to exclude the jurisdiction, I apprehend it is clear, that the jurisdiction must be in that visitor, and that his decision upon the point is final. This is so broadly stated in all the cases since *Philips* v. *Bury* (2), that it cannot be necessary that I should refer to authorities in support of it. The case of *Rex* v. *Bishop of Chester* (3), shows that the rule applies as well to Cathedral as to other bodies."

Sir F. Thesiger, contrà:

It must be admitted that, if the Bishop is visitor *quoad hoc*, the prosecutor cannot, after the decision in *Reg.* v. *Dean and Chapter of Chester* (4), raise the question of lawful cause in this Court. But, if he be not the visitor, then, there being an allegation in the return that the prosecutor was dismissed for lawful cause, and the pleas denying such cause, the question, whether or not sufficient cause appears, may, upon this record, be open to discussion (5).

(1) *Whiston* v. *The Dean and Chapter of Rochester*, 7 Hare, 532, 561.
(2) Skin. 447.
(3) 1 W. Bl. 22.
(4) 81 R. R. 949 (15 Q. B. 513).
(5) The demurrer to plea 1 alleged, as to so much as related to the return of a removal for lawful cause, "that the same plea traverses and denies an averment which is not traversable, and which is immaterial and stated after 'to wit' and not positively alleged or stated: that the plea traverses and denies the lawful cause for the said

The Bishop is not the visitor *quoad hoc*; first, because, *assuming, for the purpose of the argument, that he is the visitor generally, his authority is suspended in this case by reason of personal interest; the prosecutor having been removed for libel, not only on the Dean and Chapter of Rochester and other Deans and Chapters, but on the Bishop himself. It is suggested that the prosecutor cannot by his own wrong disqualify the visitor: but it is contrary to the most established principles, and to natural justice, that any person should be Judge in his own cause. The rule would apply to the Judges of this Court, if they were called upon to try a matter in which their jurisdiction was final, and each of them had a personal interest (1). If it was necessary, in order to justify the removal, that the libel on the Bishop should be one ground of accusation, that is a cause of dismissal, as much as if it had been the only cause. If the removal was really for the libel on the Dean and Chapter, and that ground was sufficient, it is their own fault that they did not confine the accusation to that. The principle relied upon is laid down in many cases. BULLER, J. says in *Rex* v. *The Bishop of Ely* (2): "Secondly, As this was not a visitatorial act, it is impossible that the propriety of the Bishop's conduct can be enquired into by him as visitor, for this would be to determine upon his own right. This point is so clear, that if there *were no authority on the subject, I should not have hesitated to make the first determination upon it. A visitor cannot be a Judge in his own cause, unless that power be expressly given him. A founder indeed may make him so, but such an authority is not to be implied; he cannot visit himself. In the present instance the Bishop of Ely claimed an

[*25]

[*26]

removal, which allegation of lawful cause ought not to be and cannot be by law traversed or denied or put in issue in such pleadings as the present: that it does not appear with certainty whether the said plea denies only the existence of a lawful cause, or that the removal was founded on a supposed lawful cause, or denies both," &c. The demurrer to plea 2 stated, as to so much as related to the return of an omission to call in the visitor: that it does not appear with certainty how the Bishop was disqualified or interested; that the plea sets up personal misconduct as a disqualification, and sets it up so that no proper issue could be taken upon it; that the interest is so stated that, if issue were taken upon it, matter of law must be tried by a jury; that the plea is uncertain, and double, &c. The demurrer to plea 3 stated: "That the plea confesses the matters in the return, and endeavours to avoid them by matter uncertainly and insufficiently pleaded and immaterial: that, if the plea denies the return or any part of it, it does so in an insufficient and improper manner, and should have concluded to the country" &c.

(1) See Year B. Hil. 8 Hen. VI. fol. 18 B., 19 B. pl. 6, cited in *Dimes* v. *Proprietors of The Grand Junction Canal*, 3 H. L. C. 759, 787.

(2) 1 R. R. 484 (2 T. R. 290, 338).

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interest, and asserted a right, in the appointment of the master; and that appointment is the act complained of. The case of *Rex* v. *The Bishop of Chester* (1) is a strong authority on this point: it does not indeed go the whole length of this case; but the principle of it is, that the same person cannot be the visitor and the visited." The incapacity of the Bishop of Chester to visit, established by the last cited case, caused the passing of stat. 2 Geo. II. c. 29. It is laid down in *Brookes* v. *The Earl of Rivers* (2) that, "where a Judge has an interest, neither he nor his deputy can determine a cause:" and the same doctrine appears in *Wood* v. *The Mayor and Commonalty of London* (3): therefore the Bishop here could not visit by his Chancellor. It has been said that even an Act of Parliament to make a man Judge in his own case would be void as against natural equity: *Day* v. *Savadge* (4). Among the more modern cases on this point are *Reg.* v. *The Cheltenham Commissioners* (5), *Reg.* v. *The Justices of Hertfordshire* (6), *The Grand Junction Canal Company* v. *Dimes* (7), *Dimes's* case (8), and *Reg.* v. *Aberdare Canal Company* (9). [*27] The general rule on this point applies *à fortiori* in the *case of a visitor, whose power is discretionary and under no controul.

(The COURT adjourned the argument at this point, and, on the subsequent hearing, directed *Sir F. Thesiger* to confine himself to the question as to the visitor's authority.)

Secondly; by the statutes of this foundation the Bishop is not visitor as to the Grammar School. A visitor may be so for one purpose and not for another, if the statutes restrain him: per ASHHURST, J. in *Rex* v. *The Bishop of Ely* (10). "There is no technical form of words for granting a visitatorial power, but it may be by any words showing that meaning;" "and visitatorial power may be divided, one set of visitors to one purpose, and another to another purpose:" per Lor HARDWICKE in *Attorney-General* v. *Middleton* (11). The visitatorial power here is given, and obedience to it prescribed, in large and general words, by statute 38, *De Visitatione Ecclesiæ*. But statute 35, *De Corrigendis Excessibus*,

(1) 2 Stra. 797; *S. C.* 1 Barn. K. B. 52.
(2) Hardr. 503.
(3) 1 Salk. 397; *S. C.* Holt, 396.
(4) Hob. 85, 87.
(5) 55 R. R. 321 (1 Q. B. 467).
(6) 66 R. R. 556 (6 Q. B. 753).
(7) 12 Beav. 63; 2 Mac. & G. 285; see 74 R. R. 107, and p. 26 above.
(8) 80 R. R. 303 (14 Q. B. 554). And, as to other stages of the same case, see the notes to 80 R. R. 303, 304 (14 Q. B. p. 555); and *Dimes* v. *Proprietors of the Grand Junction Canal*, 3 H. L. C. 759.
(9) 14 Q. B. 854.
(10) 1 R. R. 484 (2 T. R. 290, 335).
(11) 2 Ves. 327, 328.

contains this ordinance: "Ut in Ecclesiâ nostrâ morum integritas servetur, statimus et volumus ut si quis minorum canonicorum, clericorum, aut aliorum ministrorum, in levi culpâ deliquerit, arbitrio Decani, aut, eo absente, Vice Decani, corrigatur. Sin gravius fuerit delictum, (si justum judicabitur) ab iisdem expellatur a quibus fuit admissus:" that is, in the case of the master, the Dean and Chapter, by statute 26, *De pueris grammaticis*: whereas, if one of the canons should commit an offence or crime subjecting the Church to heavy scandal, he is to be admonished by the Dean, and, if he do not amend, accused before the visitor, and by his judgment corrected.

A further question will be, if the power of expelling for "*gravius delictum*" be in the Dean and Chapter, and they have expelled for something which clearly is not "*gravius delictum*," whether there be not such an excess of jurisdiction that the Court will award a *mandamus*, irrespectively of any visitatorial authority. Was it then "*gravius delictum*," within statute 35, to publish a pamphlet merely imputing a breach of the founder's regulations in the application of the funds?

[28]

(PATTESON, J.: That was a question of fact, which they had jurisdiction to determine.)

They have here expelled a second time for the same offence.

(LORD CAMPBELL, Ch. J.: Were the acts done in a visitatorial character?)

They have assumed so to do them; nor could they do them in any other capacity but they have proceeded *ultra vires*.

(LORD CAMPBELL, Ch. J.: The visitor has an original jurisdiction in some instances; most frequently it is vested elsewhere. It does not follow from its being so vested that the visitor has not the appellate jurisdiction.)

The existence of an appellate jurisdiction is not to be assumed, merely because there is a visitor.

Sir F. Kelly was not called upon to reply.

LORD CAMPBELL, Ch. J.:

Not having heard the whole argument, I should wish the other members of the Court to give judgment in the case.

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PATTESON, J.:

The great question is, Who, in this case, is the visitor? On the argument the other day I thought it was almost conceded that the general authority of the visitor extended to this case, unless the interest alleged in the second plea excluded him. But a [*29] further *question has been raised, on the 35th and 38th statutes, whether the Bishop is visitor at all in a matter merely concerning the school. Now statute 35 does not in any way relate to the appointment of a visitor. It provides that if any one "minorum canonicorum, clericorum, aut aliorum ministrorum," should offend "in levi culpâ," he shall be corrected, "corrigatur," "arbitrio Decani, aut, eo absente, Vice Decani." But, in case of a greater delinquency, "sin gravius fuerit delictum," he shall be expelled by the same persons who gave him admission; that is, in the master's case, the Dean and Chapter. Then follows another provision, that, if a canon be admonished of an offence for the third time and do not amend, "apud Episcopum visitatorem suum accusetur, et illius judicio corrigatur." Here then, in the cases first mentioned, of correction and expulsion, the Dean and Chapter, and no others, are the persons to act; in the last, the Bishop is the Judge in the first instance, and not by way of appeal; for here the Dean and Chapter cannot act. But then statute 38 gives a general power to the Bishop, to visit, and to correct all things, whether done by the Dean and Chapter or by any other; and the words extend, not only to reforming and correcting in the first instance, but to hearing an appeal. In *Reg.* v. *Dean and Chapter of Chester* (1), where a chorister had been removed by the defendants, this Court, on *mandamus*, held that the Bishop, as visitor, was the proper person to enquire into the removal, though in that, as in the present case, the Dean and Chapter had power by the statutes to expel, as being the persons who admitted, and it might have been said that, for that purpose, [*30] they acted as visitors. I think *that case and the present are quite alike, and the statutes now before us not distinguishable from those of Chester. The Bishop, therefore, has the authority, as visitor, to decide whether or not the Dean and Chapter have done right.

A question is then raised, whether this proceeding be not such an excess of jurisdiction in the Dean and Chapter as calls for an interference by *mandamus* though there be a visitor. I think not. If there be a visitatorial power, there cannot be such an excess of

(1) 81 R. R. 949 (15 Q. B. 513).

jurisdiction in the body to be visited as ousts him of jurisdiction; and it has been so laid down in many cases.

If then the Bishop be, as I think he is, the visitor as regards the school, the question remains, under the second plea, whether or not he is excluded by reason of interest. By that plea the cause of removal appears to be a pamphlet in which reflections are made upon the Dean and Chapter, and also upon the Bishop, both as visitor of this foundation and as Dean of Worcester: and therefore it is contended that he has an interest which prevents his acting as visitor. That a man cannot be Judge in his own cause, is a rule laid down in *Wood* v. *The Mayor and Commonalty of London* (1), *Rex* v. *The Bishop of Ely* (2), *Rex* v. *The Bishop of Chester* (3), and in other cases, which have been lately decided. The only question is, whether that principle be applicable here; whether the plea shows such an interest as would make the Bishop, if he acted, a Judge in his own cause. The Bishop, here, has no interest in the appointment. In *Rex* v. *The Bishop of Ely* (2) the case was otherwise; but there, too, the act which the Bishop had assumed to *do as visitor was [*31] not properly visitatorial. Here no direct interest is shown in either the removal or the restoration; but it is argued that, because the strictures in the pamphlet extend to him, he has not only a bias but an interest. Assuming that the plea shows the reflexions on him to have been a ground of removal, the removal was not his act, but that of the Dean and Chapter: he has no interest in the funds said to have been misapplied: nor would the application of them be any part of the question before him as visitor. Nor would it be any question before him whether or not Mr. Whiston was properly punished for reflecting on him: and, if it were, his adjudication on the subject as visitor is no remedy to him, and does not deprive him of his remedy by action. If the Dean and Chapter have expelled the master for a libel on the Bishop, they cannot thereby oust him of his right to proceed at law. In *Brookes* v. *The Earl of Rivers* (4), where a prohibition was refused because the alleged interest of the Judge was not made out, it was further objected that one of the parties was his relation by marriage; but the COURT said that "Favour shall not be presumed in a Judge." So, here, favour ought not to be presumed because the Bishop is libelled in this pamphlet. The second plea, therefore, is no answer, since it fails to show an interest in the visitor; and the visitatorial power itself

(1) 1 Salk. 397.
(2) 1 R. R. 484 (2 T. R. 290).
(3) 2 Stra. 797.
(4) Hardr. 503.

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is not brought in question by it, the only question on the plea being whether or not the power is suspended.

WIGHTMAN, J.:

[*32] As to the Dean and Chapter being *visitors *quoad hoc*, the argument entirely fails. Nothing here is done by them as visitors; nor are they authorized to do anything in that character by statute 35. Under that statute they may expel for certain offences; but in doing so they do not act as visitors: if they are wrong in their exercise of jurisdiction, the only question is to whom an appeal lies. The power, generally, in such cases, is with the visitor; and, where it is so, this Court has no jurisdiction. Now nothing can be more large than the terms in which authority is given to the Bishop: "Cui quidem" "plenam concedimus potestatem et auctoritatem ut super singulis articulis in statutis nostris contentis, et quibuscunque aliis articulis statum, commodum aut honorem Ecclesiæ nostræ concernentibus, Decanum, canonicos, minores canonicos, cæterosque ministros et cogat et eorum quemlibet per juramentum Ecclesiæ præstitum veritatem dicere de omnibus delictis et criminibus quibuscunque. Comperta autem et probata, juxta delicti et criminis mensuram, puniat Episcopus, atque reformet, omniaque faciat quæ ad vitiorum resecationem necessaria videbuntur, quæque ad visitatoris officium de jure pertinere dinoscuntur. Quos quidem omnes, tam Decanum quam Canonicos, et alios Ecclesiæ nostræ ministros, quoad omnia premissa volumus et mandamus ipsi Episcopo parere et obedire." If the Dean and Chapter commit a mistake in the exercise of their functions, the person who has the general supervision is the Bishop. The Dean and Chapter did not act as visitors in removing the master. That act is an ordinary incident in the administration of such bodies, and is not visitatorial. The case is undistinguishable from *Reg.* v. *Dean and Chapter of Chester* (1);

[*33] *the objection now made might, if valid, have prevailed there. As to the other points, my brother PATTESON has expressed my opinion.

ERLE, J.:

As to the first question: it is clear that, under statute 35, the Dean and Chapter have an original jurisdiction to remove an officer of this kind for a grave offence. It is also clear that, under statute 38, the visitor has power to say whether such removal has been wrong. He is to do all that pertains to the office of visitor: he

(1) 81 R. R. 949 (15 Q. B. 513).

may himself expel if the Dean and Chapter ought to have expelled but have not: and it follows that he is the person to adjudicate as visitor when the master has been removed and alleges that the removal is wrongful. Secondly, is the removal complained of such a clear excess of the jurisdiction that the Dean and Chapter have no right to contend that it is within the visitor's cognizance? The ground of dismissal is an alleged libel. A publication may be so libellous as to be a grave offence. Whether it is so or not, is for the determination of the Dean and Chapter. If they have jurisdiction at all, they have authority to decide this. The complainant alleges that it was their duty to decide in his favour: if so, it was their duty to entertain the question: how they should decide, it was for them to consider. I agree with my brother PATTESON that the visitor here has no personal interest which disqualifies him.

LORD CAMPBELL, Ch. J.:

Having been absent during part of the argument, I did not wish to give my opinion *till my learned brothers had decided the case: [*34] but I think I may now say that I entirely concur with them. It was argued that, by virtue of statute 35, the Dean and Chapter were visitors in this case; but I think not. All they do under that statute is matter of appeal under statute 38. They have an original jurisdiction as to amotion, but subject to appeal. In this case, therefore, the proper appeal was to the visitor, unless he was disqualified by interest. The rule is, no doubt, that a man shall not be Judge in his own cause. But here the Bishop is no party, and has no interest in the result. Those who contend for the disqualification might as well say that, if the master had been removed for a libel on the Judges of the Queen's Bench, we should for that reason have had no jurisdiction.

Judgment for the Crown.

REG. *v.* THE INHABITANTS OF LLANELLY, BRECKNOCKSHIRE (1).

1851. *May 7.*

[40]

(17 Q. B. 40—48; S. C. 20 L. J. M. C. 179; 15 Jur. 510.)

A married pauper and her children were removed by an order of justices from the parish where she had resided, as a married woman, for ten years continuously. Two years before the order of her removal, her husband had left her and gone to America. She had received letters from him since his

(1) Cited, *Reg.* v. *Manchester Overseers* (1881) 8 Q. B. D. 53, 51 L. J. M. C. 6; *West Ham Guardians* v. *Churchwardens of St. Matthew, Bethnal Green* [1894] A. C. 230, 236, 63 L. J. M. C. 97, 70 L. T. 813.—A. C.

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departure, and was daily expecting, at the time of the hearing of the appeal, to receive a letter from him containing money to enable her and her children to join him. The Sessions having quashed the order, and stated the above facts in a case for this Court:

Held, that there was a disruption of the husband's residence, and that such disruption rendered the wife and children removeable, notwithstanding their unbroken personal residence in the respondent parish.

ON an appeal against an order of justices, dated 12th July, 1850, for the removal of Margaret George and her three children from the parish of Llanelly, in Brecknockshire, to the parish of Llanelly, in Carmarthenshire, the Sessions quashed the order, subject to the opinion of this Court upon a case, which was in effect as follows.

The pauper had been married ten years last May, and had resided within the respondent parish ever since. She had three children born since her marriage. About two years ago her husband left her in a cottage in the respondent parish, and went to America, where he then was. She had received letters from him, one only a week before the Sessions, and was in daily expectation of receiving another letter from him, with money for the purpose of defraying the expenses of herself and her children over to her husband in America.

The respondents cited *Reg.* v. *Pott Shrigley* (1); and the appellants referred to *Reg.* v. *East Stonehouse* (2). The justices were of opinion there was no disruption of the five years' residence, and that the
[*41] five years were still running on in the respondent *parish: and therefore the order was quashed without discussing the other grounds of appeal.

Should this Court affirm the order of Sessions on the irremoveability by reason of residence, the order of removal was to be quashed on that ground: should the Court be of opinion that the order of Sessions was wrong, then the order of removal to be confirmed.

Pashley, in support of the order of Sessions:

The order of removal was properly quashed, inasmuch as the pauper and her children had been irremoveable under stat. 9 & 10 Vict. c. 66, s. 1, by reason of an unbroken residence of five years in the appellant parish up to the removal. It was contended by the respondent parish that, although there had, *primâ facie*, been a

(1) 76 R. R. 233 (12 Q. B. 143).
(2) 12 Q. B. 72, where, however, no decision took place on the point now raised.

residence by the wife of more than five years, there was such a disruption of the husband's residence as to make the wife removeable. *Reg.* v. *Pott Shrigley* (1) will be relied on by the other side. But there the disruption of the husband's residence, which was caused by his being transported, took place before he had resided five years in the parish. In the present case the husband had resided more than five years before the alleged disruption. He had not since then changed his domicile; so that, if he had returned before the order of removal was made, he would have been legally irremoveable; and it is upon the legal irremoveability of the husband, and not upon the mere fact of his absence from or presence in the parish, that the irremoveability of the wife depends: *Reg.* v. *St. Ebbes* (2). It is true that here the wife, at the time of the hearing of the appeal, was in expectation of a letter *from her [*42] husband containing the means for her departure from the parish; but that only shows, at most, that the husband had an intention of changing his domicile at some future time. Nor is there any evidence that there was such expectation on the part of the wife, or, consequently, such intention on the part of the husband, at the time of the making of the order, which is the date that must be looked to as material. It cannot, therefore, be said that the husband has changed his residence while the wife and children remain in the parish under these circumstances.

(LORD CAMPBELL, Ch. J.: Must we not consider that the husband's domicile is transferred, whatever may be the legal effect of such transference? Suppose that he were actually established in a mercantile concern in America; is his domicile still in England, until his wife and children join him?)

That is a question of fact as to which a jury might draw an inference either way.

(LORD CAMPBELL, Ch. J.: There might be a question as to the operation of the change of domicile under stat. 9 & 10 Vict. c. 66; but there could be no doubt of such change having taken place; the husband's personal property, if he died in America, would be administered according to the law of that country.)

Somerville v. *Lord Somerville* (3) is an authority against the personal property, under circumstances like the present, being administered

(1) 76 R. R. 233 (12 Q. B. 143).
(2) 76 R. R. 230 (12 Q. B. 137).
(3) 5 R. R. 155 (5 Ves. 750).

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according to the *lex loci rei sitæ*. The *lex domicilii* is to be looked to; and, according to Pothier, Coutumes d'Orleans, Introduction, c. 1, s. 20, p. 7, (Œuvres, vol. 5, ed. 1780, 4to), the wife's residence is a material point in ascertaining the disputed domicile of the husband. Moreover, the Sessions having decided, *upon the evidence laid before them, that there was no disruption, this Court will not review their decision. It might be a question here, whether there was any evidence at all for such a decision, but not whether the decision upon the evidence was correct. Even the question whether, in the case of a pauper's departure from the parish in which he has been residing, there is an *animus revertendi* or not, is properly a question of fact for the Quarter Sessions: *Reg.* v. *Tacolnestone* (1). Here it does not appear with what object the husband went to America; and the Sessions have not raised any question of law by their decision.

[*43]

Further: even if the husband had changed his domicile, and had abandoned his wife, she would not have lost her irremoveability, as she acquired it before the husband's change of domicile. In *Reg.* v. *Pott Shrigley* (2) the husband had never acquired irremoveability at all, so as to render the wife irremoveable.

(LORD CAMPBELL, Ch. J.: Can the wife acquire irremoveability *proprio jure*?)

The language of stat. 9 & 10 Vict. c. 66, s. 1, is certainly intended to give the wife that power: "such person" applies equally to the husband and the wife.

(ERLE, J.: The proviso at the end of the section makes the removeability of the wife and children dependent upon that of the husband; and stat. 11 & 12 Vict. c. 111, s. 1, so interprets it.)

The exact meaning of the proviso is not very clear; and the interpretation given to it by stat. 11 & 12 Vict. c. 111, s. 1, has not made it less perplexing. The latter statute seems intended to provide that the absence of the *husband, which creates a physical irremoveability from the parish, does not create such an irremoveability as to render the wife irremoveable. The question had been raised in *Reg.* v. *St. Ebbes* (3).

[*44]

(PATTESON, J.: Suppose the man in the present case had been

(1) 76 R. R. 238 (12 Q. B. 157).
(2) 76 R. R. 233 (12 Q. B. 143).
(3) 76 R. R. 230 (12 Q. B. 137).

unmarried, and had gone for a time to America. If he had returned before the day of the making the order, he would be removeable: you could not incorporate the time during which he resided in the parish, before going to America, with the time during which he resided in the parish after his return. Can you contend that in such a case he would be irremoveable?)

He would certainly be irremoveable in the absence of any explanation of the cause of his absence.

(LORD CAMPBELL, Ch. J.: What question of law do you say that the Sessions have reserved?)

None; unless it be the question, Whether there was any evidence at all for the fact which they decided.

(PATTESON, J.: They seem to find that there was no disruption, because the wife still remained in the parish.)

The fair inference of fact, upon the evidence, is, that the husband was in doubt as to his return. But, at all events, the question is one of fact only, and cannot be again raised here. In *Reg.* v. *St. Marylebone* (1) this Court refused to draw an inference as to intention.

Willes, contrà, was stopped by the COURT.

LORD CAMPBELL, Ch. J.:

The argument has failed to satisfy me that I was wrong in the opinion which I entertained at first, that, where the husband is absent, *so as [*45] to cause a *primâ facie* disruption of the residence, the *onus* is upon those who dispute that fact to show an *animus revertendi*. Here no evidence has been given of such intention; and what little evidence there is weighs the other way. It appears that the husband has established himself in America, and that his wife expects a letter from him containing the means for her removal to his new abode. It seems clear, therefore, that he is not resident in the respondent parish; and, if he is not resident himself, it is impossible to contend that the wife has, by her own residence, acquired the right of irremoveability.

PATTESON, J.:

The wife and children are removeable unless the husband, at the time of the making of the order, is irremoveable. It does not at all follow, as a matter of course, that the mere absence of the husband

(1) 83 R. R. 465 (16 Q. B. 299).

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creates a disruption. In *Reg.* v. *Tacolnestone* (1) there was abundant evidence to show an *animus revertendi* in the husband. But here it is for those who seek to prove the husband's irremoveability to show that he had an intention of returning from America; and the evidence, as far as it goes, is against such an inference. The order of Sessions must therefore be quashed.

WIGHTMAN, J.:

Reg. v. *Pott Shrigley* (2) is a direct authority to show that the wife's residence does not render her irremoveable if the husband be removeable. The question, therefore, here is, whether there was any
[*46] disruption of the husband's residence? It has been *contended that he must, *primâ facie*, be presumed to reside in the parish where he himself formerly resided, and where his wife and children still reside. But, here, there are additional circumstances which throw the *onus probandi*, with regard to the husband's residence, on the other side; for it would appear from his letters that he had no intention of returning.

ERLE, J.:

The evidence is clearly in favour of the conclusion that there was a disruption of the husband's residence. If the unbroken residence of the wife is to do away with the disruption of the residence of the husband, the wife might be irremoveable even though the husband had been abroad for ten years, and had never been within the parish. That is clearly not the meaning of the Act. The order of Sessions is bad, and must be quashed.

Order of Sessions quashed.

1851. *Nov.* 13.

[46, *n.*]

REG. *v.* THE INHABITANTS OF MANCHESTER (3).

(17 Q. B. 46, *n.*—48, *n.*)

Pauper had lived five years in a parish, not that of her settlement, when she became chargeable and an order was made for her removal. At the commencement of the five years her husband resided with her in the parish; but he left her, during the five years, and went to live in America without *animus revertendi*. During the five years and before the order of removal, he died.

Held that the pauper was not irremoveable under stat. 9 & 10 Vict. c. 66, s. 1, or 11 & 12 Vict. c. 111, s. 1.

ON appeal against an order of justices, dated 30th of May, 1850. for removing Catherine Speakman, widow of Joseph Speakman, and her five children, from the township of Barton-upon-Irwell

(1) 76 R. R. 238 (12 Q. B. 157).
(2) 76 R. R. 233 (12 Q. B. 143).
(3) *West Ham Guardians* v. *Church-wardens of St. Matthew, Bethnal Green* [1894] A. C. 230, 236, 63 L. J. M. C. 97, 70 L. T. 813.

to the township of Manchester, both in the county of Lancaster, the Sessions confirmed the order, subject to the opinion of this Court upon the following case.

In April, 1838, the pauper Catherine was married at Manchester to Joseph Speakman, who never acquired any settlement in his own right, *but who had a derivative settlement in the appellant township. [*47, *n.*] At the time of the marriage the husband was residing in the respondent township, the wife in the appellant township. About four months after the marriage, the wife went to reside with her husband in the respondent township; and they resided together, occupying a house in that township, without interruption, and without receiving relief, until the beginning of April, 1848, when the husband gave up his house and sold the greater portion of his furniture; and on the 14th of the same month, he left England for America, having arranged with his wife that, as soon as he got settled there, he would send for her and the children. He never returned from America, but died there in July, 1848. After the house had been given up, and before the husband left for America, the whole family removed into lodgings which the husband furnished with that portion of his furniture which had not been sold, in which lodgings he, with his wife and children, slept for several nights before, and on the night of, the 13th of April, 1848. When he left England, four of the five children mentioned in the order were born; the fifth was born soon after. Immediately after the husband left for America, the wife applied for and obtained relief from the respondent township for herself and her children; which relief continued to be given down to the time of the making of the order appealed against. The wife and children continued to reside in the respondent township up to the date of the order of removal. The Sessions found that there existed no *animus revertendi* on the part of the husband Joseph Speakman at the time he left the respondent township for America, and confirmed the order. The question upon the above facts was, whether the pauper Catherine and her children were, at the date of the said order, removeable from the respondent township or not. If this Court should determine that they were, the order of Sessions was to be affirmed: if that they were not, the order of Sessions to be reversed and the order appealed against to be quashed.

R. Hall, in support of the order of Sessions:

This case is in all material points the same as *Reg.* v. *Llanelly* (1),

(1) *Supra*, p. 329.

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but is stronger, as the Sessions have found that the husband had no *animus revertendi*. The fact of his death cannot better the position of the appellants.

The COURT then called upon

Pashley, contrà:

By stat. 11 & 12 Vict. c. 111, s. 1, the wife is not removeable under stat. 9 & 10 Vict. c. 66, from any place from which the husband is irremoveable under that Act. Assuming, therefore, that the pauper Catherine would have been removeable, and the residence broken, if the husband had been alive, that is no longer the case now that he is dead and that the term "removeable" cannot apply to him. *A minor, ceasing to be one of his father's family, is emancipated from that time if the separation continues till he attains the age of twenty-one; but, if he returns home before coming of age, his former status revives, and there is no emancipation: *Rex* v. *Rotherfield Greys* (1). That state of things is analogous to the present.

[*48, *n.*]

LORD CAMPBELL, Ch. J.:

The husband being absent without *animus revertendi*, the wife was removeable the moment she became chargeable; as the husband himself would have been if he had been alive and forthcoming. This being the situation of the wife, his death could not restore her former status.

PATTESON, COLERIDGE and WIGHTMAN, JJ. concurred.

Order of Sessions confirmed.

1851. *May* 5.

[48]

REG. *v.* THE INHABITANTS OF SHAVINGTON CUM GRESTY.

(17 Q. B. 48—51; S. C. 20 L. J. M. C. 194; 15 Jur. 560.)

Relief given to or on account of the children, under sixteen, of any widow is, by the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 56, to be considered as given to the widow. But it is nevertheless relief given to the children also; and the time during which they so receive relief must be excluded from a computation of the five years of residence necessary to make them irremoveable under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66).

ON appeal against an order of justices, dated 26th March, 1850, for the removal of two pauper children from the township of Manchester to the township of Shavington cum Gresty in the county of

(1) 1 B. & C. 345.

Chester, the Sessions confirmed the order, subject to the opinion of this Court upon a case, which was in substance as follows:

The case stated that the paupers resided in fact in the township of Manchester for eight years next before the application for the order appealed against. For the first five years of that period the mother of the paupers was a widow, residing with them, and in the receipt of relief from the appellant township for the support of herself and the paupers, her legitimate children. Ever since the death of their mother, which took place three years before the application *for the [*49] order in question, the paupers had received relief from the township of Manchester. The paupers were respectively under the age of sixteen years, and unemancipated whilst so residing with their mother. (The case then stated the several points made at Sessions on behalf of the appellants and of the respondents.)

If the Court of Queen's Bench should be of opinion that the paupers were removeable at the date of the making of the said order, such order was to be confirmed; if the Court should be of a contrary opinion, the order to be quashed.

Pashley, in support of the order of Sessions:

The paupers are removeable, inasmuch as, by stat. 9 & 10 Vict. c. 66, s. 1, the time during which they received relief from the appellant township must be excluded in the computation of the time necessary to render them irremoveable by reason of a five years' residence. It is contended, on the other side, that the paupers did not, properly speaking, receive relief at all, their mother, with whom they were residing, being the person to whom, legally, the relief was administered, although the children shared in the benefit of it. But, in the first place, the case itself expressly finds that the relief in question was received by the mother "for the support of herself and the paupers:" and, secondly, the argument on the other side is founded upon a misconception of the meaning of stat. 4 & 5 Will. IV. c. 76, s. 56. The provision relied on, namely that "any relief given to or on account of any child or children under the age of sixteen of any widow shall be considered as given to such widow," was framed for the purpose of making the mother, as well as the children, chargeable in respect of *relief immediately given to the children only: not [*50] of making the mother chargeable instead of the children.

Couch, contrà:

The question turns on the construction of stat. 4 & 5 Will. IV.

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c. 76, s. 56; and it lies upon the respondents to prove that the present case does not fall within the general enactment of stat. 9 & 10 Vict. c. 66, s. 1, but within the proviso. Now the relief given to the paupers must, for legal purposes, be considered relief given to the widow alone.

(LORD CAMPBELL, Ch. J.: The construction adopted by the respondents would treat the relief as given to both mother and children, so that the mother would become removeable by reason of such relief, although she was not the party immediately relieved.)

That is what the respondents contend.

(ERLE, J.: Is not the head of the family liable for the relief afforded to the other members of it?)

That is by stat. 43 Eliz. c. 2, s. 7; and stat. 4 & 5 Will. IV. c. 76, s. 56, contains a proviso that such liability is not to be destroyed by any enactment in the latter statute.

LORD CAMPBELL, Ch. J.:

I am of opinion that the paupers were removeable, and that the order of Sessions should be confirmed. The intention of stat. 9 & 10 Vict. c. 66, s. 1, was to make any pauper irremoveable after an unbroken residence of five years in any parish, unless (among other exceptions) during any part of such time he should have received parochial relief from any parish. Here it is found, by the case, that the mother, for five out of the eight years during which the paupers were in the parish, was in the receipt of relief for
[*51] the support of herself and children. That is, in *effect, a finding that the children received relief during that time. The construction of stat. 4 & 5 Will. IV. c. 76, s. 56, which is contended for by the appellants cannot be supported. That section, it is true, enacts that relief to the children shall be considered as relief to the parent; but that is not meant to prevent the relief being considered as given to the children also; the intention of the clause was to make the parent removeable in respect of such relief, as much as in respect of relief actually and immediately given to the parent. I think, therefore, that the paupers must be considered to have received parochial relief from the appellant township within the meaning of stat. 9 & 10 Vict. c. 66, s. 1, and that they were removeable in consequence.

PATTESON, J.:

Stat. 4 & 5 Will. IV. c. 76, which is incorporated with stat. 9 & 10 Vict. c. 66, enacts, in sect. 56, that relief to the children shall be considered as relief to the parent. But I do not see why that enactment is to exclude the children from being considered as having received relief. The case here expressly finds that the relief was for the support of the children as well as of the mother: and I think, therefore, that they were receiving relief within the meaning of stat. 9 & 10 Vict. c. 66, s. 1.

WIGHTMAN and ERLE, JJ. concurred.

Order of Sessions confirmed.

REG. *v.* THE INHABITANTS OF CALDECOTE.

1851. *May* 7, 10.

(17 Q. B. 52—59; S. C. 20 L. J. M. C. 187; 15 Jur. 537.)

[52]

Paupers, who had resided in parish S. ever since 1835, were removed in 1845, under an order of justices, unappealed against, to parish C. They were delivered to the overseer of C. at his house in C., remained there a few hours, and then returned to S. the same day, and slept there the same night; an agreement having been made between the officers of the two parishes, that the paupers should continue to reside at S., and be relieved at the cost of C. They continued to reside at S. under this arrangement up to the passing of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66); after which an order of justices was made for their removal from S. to C.:

Held, on appeal against the order, that the paupers were not irremoveable by reason of a five years' unbroken residence in S.

ON appeal against an order of justices, dated 12th May, 1847, removing Thomas Freer and his three children from the parish or township of Stoke Golding in Leicestershire to the parish or township of Caldecote in Warwickshire, the Sessions confirmed the order, subject to the opinion of this Court on a case, by which the following facts appeared.

The place of the last legal settlement of the paupers was in the parish of Caldecote, to which place they had been removed in the middle of May, 1845, under an order of justices, duly executed and unappealed against, bearing date 22nd April, 1845.

The case set out the order, which was for removal from Stoke Golding to Caldecote, and which adjudicated the last settlement to be in Caldecote.

The pauper Thomas Freer had resided in Stoke Golding from the year 1835 or thereabouts, with the exception of the period of

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his and his family's removal under the order of April, 1845, which took place as follows. At the time of the execution of the last mentioned order, the paupers were delivered to one of the overseers of Caldecote, at his house, which was not in the parish of Caldecote, but near thereto; and there *they remained about one hour, and received from him 2*s.* 6*d.* for relief; after which they were delivered, at the request of the said overseer, at the house of the other overseer of Caldecote, in that parish. They remained at his house but a few minutes, and had some refreshment from his wife, and then returned to the parish of Stoke Golding on the same day, and slept in the parish of Stoke Golding the same night. They had been at lodgings for about three or four months up to the removal, and had previously resided in a dwelling-house there for upwards of twelve months. The return of the paupers to Stoke Golding, as above stated, was in pursuance of an agreement entered into on the day of, and after, the removal, between the officers of that parish and of Caldecote, that the paupers should return to Stoke Golding, and be relieved there, and that the relief to be afforded should be repaid by Caldecote: and this arrangement was adhered to until the passing of stat. 9 & 10 Vict. c. 66; since which time the officers of Caldecote have declined to repay any relief.

[*53]

If the Court of Queen's Bench should be of opinion that the Sessions were right in confirming the order of removal upon the facts above stated, the order of Sessions was to stand confirmed; if of the contrary opinion, both orders to be quashed.

G. T. White, in support of the order of Sessions:

The execution of the order of removal, and the acquiescence of Caldecote at the time of such execution, create a break in the residence: *Reg.* v. *Halifax* (1). It is true that, in the present case, the parties removed *under the order did not sleep in the parish to which they were removed. But this does not destroy the evidence that the officers of that parish acquiesced in the removal. Nor was there any *animus revertendi* in the paupers, to keep up the continuity of residence: any disposition they might have to return was subject to the will of the officers. *Reg.* v. *Seend* (2) is scarcely to be distinguished from the present case. If the paupers here had returned to Stoke Golding without the agreement on that point between the two parishes, they might have been treated by Stoke Golding as vagrants.

[*54]

(1) 76 R. R. 221 (12 Q. B. 111). (2) 76 R. R. 227 (12 Q. B 133).

(LORD CAMPBELL, Ch. J.: Must there not be a pernoctation to create a cesser of residence?)

A cesser of inhabitancy is all that is necessary to destroy the irremoveability: and the removal here was sufficient to create a cesser of inhabitancy at all events.

(ERLE, J.: In stat. 13 & 14 Car. II. c. 12, inhabiting and being settled seem to be treated as synonymous.

LORD CAMPBELL, Ch. J.: Is there any case where an absence for a few hours only has been held to have the effect of destroying the irremoveability?)

An absence under an order of removal, if only for two hours, would be sufficient.

(ERLE, J.: Suppose the holder of a tenement in a parish conveyed it away, and immediately afterwards walked out and purchased another in the same parish: I am inclined to think that there would be a complete cesser of his residence in the parish during the time between the conveyance and the purchase. I do not think the pernoctation is necessary to create a cesser. Certainly it is not always sufficient to create it: a mail coach guard may sleep out of his parish without ceasing to reside there.)

Macaulay and *G. Hayes*, *contrà*: [55]

The doctrine that any constrained absence, if lawful, even for the fraction of a day, suffices to break the residence, is much too broad. There is no reason why the absence in the present case, which was for a few hours only, under an order of removal, should break the residence, any more than an absence under a writ of *subpœna*, or under a charge of felony, which was held, in *Reg.* v. *Holbeck* (1), not to cause a break. There, no doubt, the COURT said there must be an *animus revertendi*, in order to preserve the continuity of residence: but this question does not arise here, as, in order to make an *animus revertendi* necessary, there must first be an interruption of residence: here there was no interruption at all.

(ERLE, J.: Here the absence, as the other side contend, is under an order expressly changing the residence.

(1) 83 R. R. 513 (16 Q. B. 404).

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WIGHTMAN, J.: The very object of the order of removal was to prevent irremoveability.

ERLE, J.: The enactment of stat. 13 & 14 Car. II. c. 12, s. 1, was that a man might be removed within forty days after he had come to settle: the non-removal within that time was supposed to show acquiescence on the part of the parish, and so to establish a settlement: after that, by subsequent enactments, notice became necessary: and thus, serving an office was made to give a settlement as showing notice and so furnishing evidence of acquiescence. You say that, if the parish took the pauper before a justice, in order to get rid of him, and the justice assented to his removal, the non-removal in fact was equivalent to an acquiescence by the parish and to a continuance of residence.)

[*56] No doubt, under the old law, the pauper could be displaced, and there would be no acquiescence. But *stat. 9 & 10 Vict. c. 66, s. 1, creates an irremoveability, not by a settlement inferred from acquiescence, but by a residence, in order that a man may not be displaced from the place where he has exercised his industry for five years. The principle therefore, to which allusion has been made, does not apply to the question of irremoveability under the recent Act. The pauper, under the old law, would return from the parish of his settlement in violation of the law of settlement: here the parish receiving him back intended to renounce the right of removal.

(PATTESON, J.: The revocation, assuming that the agreement between the parishes can be treated as such, was after the removal.)

It is not an uncommon practice to go through the form of removing a pauper by an order of justices, for the purpose of ascertaining his settlement, and then to retransfer him to his original parish by agreement. The question in this case really turns upon the meaning of the word "resided" in stat. 9 & 10 Vict. c. 66, s. 1. In 1 Nolan's Poor Law, p. 465, the place of residence is defined as that place to which a party "retires for the purpose of sleeping as the place of his ordinary and sufficient rest."

(ERLE, J.: Does a residence of five years mean a residence of five times three hundred and sixty-five nights? In case of service the settlement shifts to the last place where the pauper, during the

service, sleeps so as to make part of a complete forty days' residence in that place.)

If an absence for more than one night would not operate as a break, it cannot be contended that an absence of one or two hours during one day would have that effect. To take the illustration suggested: a forty days' residence by sleeping would not be interrupted by a removal like that in the present case.

(LORD CAMPBELL, Ch. J.: Suppose a question arose upon the *right of a man to a Parliamentary franchise, dependent upon his residence in the borough: it could hardly be said that an absence like that in the present case would be sufficient ground for holding that he had not resided in the borough. However, the meaning of the word "residence" may be differently interpreted according to the different objects of the particular enactment. [*57]

ERLE, J.: The word "inhabitants" has a peculiar and distinct meaning in the Statute of Bridges (1); there a man "inhabits" if he has rateable property within the county: but this is not the meaning of the word in all other instances.)

As to there being no power to return, in the present case, without the consent of the respondent parish, *Rex* v. *Barham* (2) shows that the mere absence of such power does not necessarily break the residence: and there Lord TENTERDEN notices and meets the argument suggested from the impossibility of returning without a breach of the law. *Rex* v. *Willoughby* (3) confirms *Rex* v. *Barham* (2). According to the argument on the other side, if the pauper had passed one step into Stoke Golding, and there the parishes had rescinded their agreement, and the pauper had then of his own accord recommenced residing in Stoke Golding, the residence would have been broken. The question is not what constitutes a removal, but what breaks a residence.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a subsequent day in this Term (May 10), delivered the judgment of the COURT:

We are of opinion that the order of removal was properly *confirmed by the Court of Quarter Sessions. This case appears to us to be [*58]

(1) Stat. 22 Hen. VIII. c. 5. See 2 Inst. 702.

(2) 8 B. & C. 99.

(3) 4 Ad. & El. 143.

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governed by *Reg.* v. *Halifax* (1) and *Reg.* v. *Seend* (2), establishing the doctrine (which we see no reason to doubt) that, in construing stat. 9 & 10 Vict. c. 66, an executed removal of the pauper under a valid order of removal interrupts the continuity of the residence in the removing parish. Here the paupers returned to the removing parish the same day on which they left it: but they had been removed from it under a valid order of removal; and they had been delivered to the overseers of the parish of their settlement. Not till after this removal was the agreement entered into between the overseers of the two parishes, respectively, that the paupers should return to the parish from which they had been removed, and, residing there, should be maintained by the parish of their settlement. There was a period of time during which they had ceased to reside in the removing parish, and during which they had no power to return to it. The duration of this period we consider immaterial. The order of removal was valid, and was *bonâ fide* carried into execution.

We do not see how this decision is at all contrary to the policy or the spirit of the Act; for the continuity of residence cannot be thus interrupted so as to prevent the irremoveability from being acquired, unless the pauper becomes chargeable; and the Legislature only intended that the irremoveability should be acquired by a five years' residence without bringing any charge upon the parish. A fictitious chargeability by fraudulent relief is guarded against by penalties (3); and the apprehension of such a possibility cannot affect the
[*59] *decision of a case where the removal took place before the passing of stat. 9 & 10 Vict. c. 66, and could not have proceeded from any fraudulent motive.

The rule for quashing the order of Sessions must therefore be discharged.

Order of Sessions confirmed.

1851. *May* 13.

SIR OSWALD MOSLEY *v.* HIDE AND COPE (4).

(17 Q. B. 91—102; S. C. 20 L. J. Q. B. 539; 15 Jur. 899.)

[91] By a marriage settlement, lands were conveyed to trustees, to the use, after the husband's death, of the wife, Judith, during her life, and on trust, upon her death, to sell, and stand possessed of the purchase-money, to be divided equally among the children of the marriage on their respectively attaining twenty-one. There were children of Judith's marriage, E. and

(1) 76 R. R. 221 (12 Q. B. 111).
(2) 76 R. R. 227 (12 Q. B. 133).
(3) Stat. 9 & 10 Vict. c. 66, s. 6.
(4) Foll. *Want* v. *Stallibrass* (1875) L. R. 8 Ex. 175, 180, 42 L. J. Ex. 108. —A. C.

MOSLEY v. HIDE.

M. After the husband's death, Judith surviving him, and E. and M. having attained twenty-one and married, the trustees sold the lands:

One of the conditions of sale recited so much of the settlement as is above stated, and that there were children, as above, who had attained twenty-one: and it stipulated "that such children, or the assigns or trustees of such of them who have aliened or settled their estates and interests, shall, if required, join in the conveyance:" "but no purchaser shall be at liberty to object to the title of the vendors on the ground that the sale is taking place in the lifetime of the said Judith." Notice of any objection by the purchaser to the vendors' title was to be given before March 2nd.

Before the sale, E. and M. had settled their respective shares in trust for themselves and their husbands during their respective lives, remainder to their issue respectively: and both had children under age:

Held that, as the children of E. and M., or the trustees on their behalf, could not, if required, join in conveying to a purchaser, the vendors, trustees of Judith, could not make a good title; that the conditions of sale implied that a good title could be so made; and that the purchaser was not precluded by the conditions of sale from taking this objection.

The purchaser, on receiving an abstract of title, gave notice to the vendors by letter, before March 2nd, that he objected to the title on the ground that a sale could not be made in Judith's lifetime; and he sent, with the letter, a conveyancer's opinion that a title could not be made during Judith's life, because the trustees under the settlements of E. and M. could not join in a conveyance without breach of trust. No other statement of objection was made before March 2nd:

Held that there was a good notice of the objection which ultimately prevailed, within the time limited.

ASSUMPSIT for money had and received, and interest, and on an account stated. Particular of demand, for 492*l.* 16*s.*, being the deposit paid by plaintiff to defendants on a contract of sale made between plaintiff and defendants in January or February, 1849, whereby certain lands and premises at Tutbury in *Staffordshire [*92] were agreed to be sold and conveyed to plaintiff, and to which lands &c. defendants have failed to show a good title (1). Plea, by each defendant, *Non assumpsit*. Issues thereon.

On the trial, before Patteson, J., at the Stafford Spring Assizes, 1851, it appeared that the premises in question were put up for sale by auction on January 2nd, 1849, under certain conditions, and were bought in, but were immediately afterwards purchased on behalf of the plaintiff (who paid 492*l.* 16*s.* deposit), subject, by an agreement which the purchaser signed, to the above conditions of sale. The defendants Hide and Cope, the vendors, were trustees under a settlement made on the marriage of Rupert Hayne Chawner, since deceased, with Judith Hide, dated 16th and 17th September, 1816, whereby the premises in question were limited to the use, after R. H. Chawner's decease, of the said Judith for life; remainder to

(1) There was a further particular, for which see p. 348, *post*.

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the defendants Hide and Cope and their heirs, during the life of Judith, in trust to preserve contingent remainders; remainder to the use of Hide and Cope and their heirs, upon trust, as soon as conveniently might be, to sell, and to stand possessed of the purchase money in trust for all and every the children of the said marriage, to be divided equally amongst them, and to be payable on their attaining twenty-one years of age, as to sons, and, as to daughters, on attaining that age, or marriage.

There were three children of this marriage living at the time of the trial, all having attained the age of twenty-one, and two of them, Elizabeth and Mary, married women, who, before their respective
[*93] marriages, *mortgaged their respective shares in the proceeds of the sale, and, by deeds made in contemplation of the said marriages respectively, bearing date 3rd June, 1846, and 26th December, 1846. settled the residue upon themselves and their respective husbands for life, with remainder to their respective issue, &c., as they should respectively appoint; and, in default of appointment, to them equally. There were children living, and under age, of both the last mentioned marriages.

The 14th condition of sale appeared on the evidence to have been as follows.

"By the settlement made on the marriage of the said Judith Chawner, then Judith Hide, spinster, with her late husband" &c., "dated" &c., "the premises, except" &c., "now stand limited to the use of the said Judith C. for life, with remainder to the said Messrs. Hide and Cope and their heirs during the life of the said Judith C., in trust to preserve contingent remainders, with remainder to the use of the said Messrs. H. and C. in trust for sale, and to stand possessed of the purchase money in trust for all and every the children of the said marriage, to be divided equally amongst them, and be payable on their attaining the age of twenty-one years. And, there being three such children only, all of whom have attained their respective ages of twenty-one years, it is stipulated that such children, or the assigns or trustees of such of them who have aliened or settled their estates and interests, shall, if required, join in the conveyance to the purchasers at the purchasers' expense; but no purchaser shall be at liberty to object to the title of the vendors on the ground that the sale is taking place
[*94] in the lifetime of the said Judith Chawner: nor *shall the vendors be required to enter into any other covenant for title than that they have not respectively incumbered the said premises."

By the 13th condition, an agreement for confirming the sale under these conditions was to be prepared and executed by the vendors and purchaser within a given time; and, in default thereof, either party might cause a stamp to be put upon a form of contract which was annexed to the conditions. The contract was stamped accordingly: but an agreement was afterwards prepared (dated February 1st, 1849), and executed by the plaintiff; and it embodied, in two of its clauses, the fourteenth condition of sale. It contained also a stipulation: "That, in case the said Sir O. Mosley, or any person or persons on his behalf, shall object to the vendors' title, or require any act, matter or thing to be done, procured or executed for completion thereof, notice in writing of the particular objection or matter required shall be given to the said Edward John Blair" (solicitor to the vendors) "on or before the 2nd day of March next; and that, in default of such notice, the said Sir O. M. and all persons claiming under him shall be considered as having accepted the title unconditionally; and that every objection or requisition not taken or made and so communicated in writing within such period as aforesaid shall be considered as waived; and that in this respect time shall be considered as part of the contract."

An abstract of title was delivered to the plaintiff's attorneys with the draft of agreement: and, on March 1st, 1849, they wrote to the defendants' attorneys: "We return you this abstract with the opinion of Mr. Vincent Smith upon the title, to which we request your attention, and regret to add that, after a careful perusal of *such opinion, we feel bound to object to the title on behalf of our [*95] client, on the ground that a sale cannot be made in Mrs. Chawner's lifetime." The opinion referred to was, as to this point, as follows:

"I think it impossible for a purchaser to acquire a marketable title, or even a safe holding title, under a sale made in the lifetime of Mrs. Judith Chawner, the tenant for life. According to the trusts of the settlement of the 17th of September, 1816, the estate is not to be sold till after Mrs. Chawner's decease: if, therefore, it should be sold in her lifetime, and if, at her decease, the estate should from any circumstance be increased in value, or the money arising from the sale should, by reason of the deficiency or failure of any security on which it may have been invested, or by reason of any breach of trust, or otherwise, become diminished in amount, I think the sale undoubtedly might, and in all probability would, be set aside in a court of equity. The question then is, whether, notwithstanding the 14th condition of sale, the purchaser is

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compellable to complete his contract; and I am inclined to think he is not. Under that condition the purchaser is entitled to require the trustees of the respective settlements of the 3rd of June, 1846, and the 26th December, 1846, and also the several mortgagees, to join in the conveyance to him; from which stipulation it was fairly to be inferred that their concurrence would sanction or confirm the sale. But, unless the trustees are authorized by their respective settlements to consent to a sale in Mrs. Chawner's lifetime, their joining in the conveyance would be useless: in fact, in the absence of a power or authority for that purpose, it would be a breach of trust in them to sanction any such sale; so that, under the 14th condition, the purchaser is entitled to require the vendors to procure certain acts to be done which would be a breach of trust in the parties doing them. I think the trustees of the respective settlements of 1846, so far from being in a position to sanction the sale in Mrs. Chawner's lifetime, would be bound to take such proceedings as might be necessary to prevent any such sale being made, or, if made, to set it aside. At all events they could not safely permit the trustees of the settlement of 1816 to receive the purchase money. I think the trustees of that settlement have themselves been guilty of a breach of trust by entering into the present contract; and I do not think a court of equity would decree a specific performance of it."

The objection, as ultimately taken in this case, and specified in a further particular delivered by the plaintiff, was as follows.

[96] "That the defendants were and are unable to convey and assure to the plaintiff a good and marketable title in fee simple to the messuage and premises agreed to be conveyed, during the lifetime of Judith Chawner, who, at the date of the contract, was, and still is, living.

"That the children of the marriage between R. H. Chawner and Judith Hide were not legally able to join in the conveyance of the said property to the plaintiff.

"That the assignees and trustees of such of the children of the said marriage who have aliened or settled their estates and interests were not legally able to join in such conveyance.

"That, in consequence thereof, the defendants could not and did not fulfil their agreement, and were unable to make and convey such a title as they had undertaken to give to the plaintiff."

The objection was urged at the trial, on behalf of the plaintiff.

The defendants relied on the 14th condition of sale, and contended, further, that specific notice of the objection had not been given within the time required by the agreement of February 1st, 1849. The learned Judge ruled in favour of the plaintiff on both points; and a verdict was returned for him (1). In this Term, *Whateley* on behalf of Hide, and *Keating* on behalf of Cope, obtained rules *nisi* for a new trial, on the ground that the jury ought to have been directed to find for the defendants. *Corrall* v. *Cattell* (2) was cited.

W. J. Alexander, *Peacock* and *Phipson* now showed cause:

The plaintiff is not precluded from this objection by the 14th condition. He does not insist that the sale *is irregular as taking [*97] place in Mrs. Chawner's lifetime, but that, in order to carry it out, her children, or the assigns or trustees of such of them as have settled their estates and interests, ought, if required, to join in the conveyance; whereas it turns out that the trustees under the settlements made by Mrs. Chawner's daughters Elizabeth and Mary, for the benefit of their children, cannot join, the children being under age; nor can the children themselves, the equitable assigns, join. And, that being so, it was not necessary that the purchaser should actually call upon the trustees or children to do that which they had no power to do. The 14th condition is an entire stipulation: no objection is to be taken because Mrs. Chawner is living; but the daughters, and the trustees or assigns under any settlement created by them, are to join in guaranteeing the title, so that the continuance of Mrs. Chawner's life may not create any actual difficulty. If she were not alive, the concurrence of these parties would not be required; the complaint is that, being wanted by reason of her being alive, a necessity contemplated at the time of sale, it cannot be had. The purchaser, then, is discharged, and entitled to recover back his deposit. In *Corrall* v. *Cattell* (2) there was a distinct stipulation that no objection should be made by the purchaser on account of a particular deed, supposed to be a forgery, but which, on the trial of the cause, was found to be genuine. There the specific objection, afterwards taken, was expressly provided against, whether the deed should be genuine or not. Here the objection is not the particular one which the condition excludes, but is founded upon the entire agreement between the *parties. As to the time of taking the objection; the letter of [*98]

(1) A bill of exceptions was tendered, but not proceeded upon.

(2) 51 R. R. 794 (4 M. & W. 784).

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March 1st, 1849, which is within the period limited, states, simply, "that a sale cannot be made in Mrs. Chawner's lifetime:" this, of itself, might be insufficient; but the opinion of counsel, forwarded at the same time, discloses the whole ground now taken by the plaintiff.

Whateley, Keating and *J. Gray, contrà:*

The defendants do not assert that they have made a good title, but that the agreement on their part is performed. The stipulation in the 14th condition was intended only to limit the chances of objection by precluding the trustees who might join in the conveyance from alleging at a future time that it was made during Mrs. Chawner's life. It was not meant that the trustees should warrant the title: such a provision would have been nugatory; for, in equity, no good title could be made in Mrs. Chawner's lifetime.

(LORD CAMPBELL, Ch. J.: Does not the condition mean that the trustees shall join effectually?)

They are to join only if required, which is at the option of the purchaser.

(LORD CAMPBELL, Ch. J.: Their joining, under these circumstances, would be no safety to him.)

That was never contemplated. He would be secure against the children of Mrs. Chawner, and their trustees, but could not be secure against the children of two of those children. To that extent, but not farther, the vendors undertake to give title: the plaintiff might, if he thought proper, take the chances of purchasing with such a title. If it was intended that a perfectly good title at law and in equity should be made, or if it had been certain that such a title could be made, it would have been idle to stipulate against the equitable objection arising from the continuance of
[*99] Mrs. Chawner's *life. The trustees could not remove that, but undertook that it should be obviated as far as could be done by other parties joining.

(PATTESON, J.: The stipulation as to the children joining seems to imply that they shall be in a condition to do so.

LORD CAMPBELL, Ch. J.: That their joining shall be of some use.)

The effect of that stipulation, if it were not qualified by the proviso

against objecting to the sale as made in Mrs. Chawner's life, would be a complete warranty. A party may, if he pleases, stipulate for taking a very imperfect title; and, here, the purchaser has consented to take one which carries with it some risk of being involved in an equity suit. The argument on the other side wholly annuls the 14th condition. But for the existence of parties who could not join, a good title might have been made in Mrs. Chawner's lifetime: the existence of such parties is the very contingency provided against (and no other can have been contemplated) in the stipulation that the continuance of Mrs. Chawner's life shall not be made an objection. Some effect must be given to that stipulation; and it is incumbent on the plaintiff to point out something in the condition which may have a countervailing effect. (On this point *Gray* cited the language of Lord BROUGHAM, L. C. in *Thornhill* v. *Hall* (1): "I hold it to be a rule," to "decisive the other way.")

LORD CAMPBELL, Ch. J.:

I think the ruling of my brother PATTESON was right. There is no doubt that a purchaser may agree to a bad title, or none. But the question is, for what the purchaser stipulated in this case. Properly, the sale ought not to have taken place *till the death of [*100] Mrs. Chawner; but it was effected in her lifetime; and the 14th condition of sale is: "There being three such children" (of the marriage of Rupert Hayne Chawner and Judith Hide), "all of whom have attained their respective ages of twenty-one years," it is stipulated that such children, or the assigns or trustees of such of them who have aliened or settled their estates and interests, shall, if required, join in the conveyance to the purchasers." The question is, what is meant by that stipulation. The defendants contend that it is enough if the trustees, without having the complete power, agree to execute the conveyance. But I think the meaning must be that they shall join, and have power to join effectually: not that they shall so join as to commit a breach of trust. They have no power on behalf of the children of Elizabeth and Mary; and therefore they cannot join in the sense of the condition: and I think that is an objection which the plaintiff is entitled to take. As to the time at which the objection was taken: I think the letter of March 1st, and the opinion, taken together, raised it sufficiently, and, therefore, that it was in time.

(1) 37 R. R. 1 (2 Cl. & Fin. 22, 36).

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PATTESON, J.:

The argument I have heard confirms the opinion I entertained at the trial. The trustees under Mrs. Chawner's settlement were entitled to sell the property and divide the proceeds, at her death; and they could, then, have made a good title: but, choosing to sell in her lifetime, they make known that fact by the conditions of sale. They could not but know how the estate stood when they published the conditions. By them they disclosed that there were children of the marriage of Judith and Rupert Hayne Chawner, but not
[*101] *that those children had married, made a settlement of their interests, or had children: and then they stipulate that a purchaser shall not object to the sale as taking place in the lifetime of Judith Chawner. If the condition had made no reference to any other parties than Judith and her children, I do not say that the purchaser must not have run the risk of such a title as the trustees can now make: but it is stipulated here that the children of Judith, "or the assigns or trustees of such of them who have aliened or settled their estates and interests, shall, if required, join in the conveyance:" that is, that all who may be prejudiced by the sale shall join: which implies that they are in a capacity to do so. Whether they were so or not was known to the sellers, but not to the purchasers. It is true that the stipulation, as now construed, may do away with the other part of the condition: but the condition is framed by the sellers; and, if this is the consequence, it is their fault. The latter part of the condition, as construed by the defendants, cannot have been intended by the parties; nor do I see, on that construction, what can have been meant by it. I think the whole is tantamount to a stipulation that all the parties referred to should join, and were in a capacity to do so.

WIGHTMAN, J. (1):

This appears to me a clear case. The trustees had power to sell on Mrs. Chawner's death, but not before: her life was an obvious defect in the title. It was not to be expected that, in the face of such an objection, a purchaser would come forward; and therefore
[*102] this condition was introduced. It is urged *that all objections to the title were to be taken before the 2nd of March, and that the only objection taken by the specified time was that from which the purchaser was precluded, namely, that Mrs. Chawner was living. But that is not so. In truth the point taken is hardly an objection to

(1) Coleridge, J. was absent on account of ill health.

the title, but rather an insisting on performance of the condition, namely that the children, or the assigns or trustees of those who had aliened or settled, should join in the conveyance. The clause must have been intended to obviate that defect of title which was evident, and must be taken to have implied that the assigns or trustees were in a capacity to join.

Rule discharged.

SIEVEWRIGHT *v.* ARCHIBALD (1).

1851. *April* 16. *June* 17.

(17 Q. B. 103—127; S. C. 20 L. J. Q. B. 529; 15 Jur. 947.)

[103]

A broker authorised by plaintiff to sell 500 tons of Dunlop's iron, made a bargain with defendant to sell it to him for a price exceeding 10*l*. The broker sent a note to the plaintiff expressing that he had sold for him 500 tons Dunlop's iron; and a note to the defendant expressing that he had bought for him 500 tons Scotch iron. Dunlop's is Scotch iron, but not the only kind of Scotch iron. The broker made no signed entry in his book. After this there was a negotiation between plaintiff and defendant as to the terms on which the defendant might be let off the contract, in which both treated the contract as binding; but there was nothing to show whether they considered the contract to be for Scotch iron generally, or only for Dunlop's, or that either was aware of the variance in the notes. The plaintiff brought an action as on a contract to deliver Dunlop's iron. *Non assumpsit* was pleaded; and at the trial the variance between the notes appeared. The declaration was then amended, so as to make the contract be to deliver Scotch iron; and the jury found that the defendant had ratified the contract contained in the bought note. Verdict for plaintiff. On motion to enter a verdict for defendant:

Held, by Lord CAMPBELL, Ch. J. and PATTESON and WIGHTMAN, JJ., that the variance between the bought and sold notes was material; and that there was no sufficient memorandum of a contract to satisfy the Statute of Frauds, 29 Car. II. c. 3, s. 17 (2).

Held, also, that there was no evidence, on which the jury could act, of a ratification of the contract.

ERLE, J. dissenting upon both points.

ASSUMPSIT for not accepting iron (3). Plea (among others): *Non assumpsit.* Issue thereon.

[104]

The cause was tried before Lord Campbell, Ch. J. at the sittings in London after Michaelmas Term, 1850. The pleadings, the manner in which they were amended, and the points reserved, are fully stated in the judgment of Lord CAMPBELL, Ch. J. (4).

Watson, in the ensuing Term, obtained a rule *nisi* to enter a verdict for the defendant pursuant to the leave reserved.

(1) See Benjamin on Sale, 5th ed., pp. 290—297.—A. C.

(2) See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.—A. C.

(3) See pp. 365, 367, *post.*

(4) *Post*, p. 365.

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Bovill, in Easter Term (1), showed cause; and *Watson* and *Hawkins* were heard in support of the rule. The arguments used and cases cited will appear sufficiently by the judgments.

Cur. adv. vult.

In this Term (June 17th), the COURT being divided in opinion, the learned Judges delivered separate judgments.

ERLE, J.:

In this case it appeared, by the evidence of the broker at the trial, that he agreed with the defendant to sell to him 500 tons of Dunlop's iron; that Dunlop's iron was Scotch; that he delivered to the defendant a bought note, in which the thing bought was named Scotch iron, and to the plaintiff a sold note, in which the thing sold was named Dunlop's iron: and it further appeared that the defendant had repeatedly admitted the existence of some contract by requesting the plaintiff to release him therefrom upon terms.

[*105] The plaintiff had declared for not accepting Dunlop's *iron: but, on the defendant producing the bought note, so that it was in evidence, and objecting that there was no contract because the bought and sold notes varied, the plaintiff then contended that the defendant had ratified the contract expressed in the bought note sent to the defendant. The declaration was then amended to agree with the bought note; and the jury found their verdict for the plaintiff, and that the defendant had ratified the contract alleged in the amended declaration. I take this to be the substance of the evidence, as stated more fully in the judgment of the LORD CHIEF JUSTICE. The defendant obtained a rule to set aside this verdict for the plaintiff, and enter it for the defendant, on two grounds: First, he contended that in cases where a contract has been made by a broker, and bought and sold notes have been delivered, they alone constitute the contract; that all other evidence of the contract is excluded; and that, if they vary, a contract is disproved; and that the notes now in question did vary: and, secondly, he contended that, if evidence was in such cases admissible, there was no evidence here to go to the jury to prove the ratification of the contract alleged in the amended declaration. But, after considering the argument, it appears to me that he has failed to establish either ground.

(1) April 16th. Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

With respect to the first ground: I would observe that the question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and that the point is, Whether such evidence is inadmissible because a sold note was delivered to the plaintiff? in other words, *Whether bought and sold notes, [*106] without other evidence of intention, are by presumption of law a contract in writing? I think they are not. If bought and sold notes which agree are delivered, and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes: but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof if they constituted a contract in writing. This seems to me to be the effect of the evidence of mercantile usage relating to bought and sold notes, given in *Hawes* v. *Forster* (1) mentioned below; and this is the ground on which the verdict in that case is to be sustained, according to the opinion of PARKE, B. expressed in *Thornton* v. *Charles* (2). The form of the instruments is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done on his behalf: the buyer is informed of his purchase, the seller of his sale; and experience shows that they are varied as mercantile convenience may dictate. Both may be sent, or one, or neither; they may both be signed by the broker, or one by him, and the other by the party; the names of both contractors may be mentioned, or one may be named and the other described; they may be sent at the time of the contract, or after, or one at an interval after the other. No person, acquainted with legal consequences, would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments: such a process is contrary to the nature of *contracting, of which the essence is inter- [*107] change of consent at a certain time. The governing principle in respect of contracts is to give effect to the intention of the parties; and, where the intention to contract is clear, it seems contrary to that principle to defeat it because bought and sold notes have been

(1) 42 R. R. 803 (1 Moo. & Rob. 372). (2) 60 R. R. 896 (9 M. & W. 802).

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delivered which disagree. They are then held to constitute the contract only for the purpose of annulling it.

It seems to me therefore that, upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. Before examining the authorities on which this proposition is supposed to be founded, I would draw attention to the distinction between evidence of a contract, and evidence of a compliance with the Statute of Frauds. The question of compliance with the statute does not arise until the contract is in proof. In case of a written contract the statute has no application. In case of other contracts, the compliance may be proved by part payment, or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing, in that it may be made at any time after the contract, if before the action commenced (1); and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only or his agent; and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement: *Egerton* v. *Mathews* (2).

[*108] I now advert to the authorities usually cited on this *point. In *Thornton* v. *Kempster* (3) the bought and sold notes could not be reconciled, and no other evidence appears to have been offered of the contract, and the plaintiff did not adopt the note delivered to the defendant; and he was nonsuited. As the case stands in the reports, there was no evidence of mutual assent to the contract alleged by the plaintiff. The point was not raised whether other evidence of the contract was admissible. In *Cumming* v. *Roebuck* (4) the statement is, that the bought and sold notes varied; and GIBBS, Ch. J. is reported to have ruled that, if the broker delivers a different note of the contract to each party contracting, there is no valid contract; and he nonsuited the plaintiff. In this case also it does not appear that any other evidence of the contract, besides the notes, was offered; and if not, this ruling is in the same way irrelevant to the present question. The learned Judge is reported to have added that a case, which states the entry in the broker's

(1) See *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357, 362, 58 L. J. Q. B. 161. —A. C.

(2) 8 R. R. 489 (6 East, 307).

(3) 15 R. R. 658 (5 Taunt. 786).

(4) Holt, N. P. C. 172. [See 30 R. R. 263.]

book to be the original contract, has been since contradicted. The facts in relation to which this opinion was expressed are not given: if it was intended to be unqualified there is authority and principle against it. In *Heyman* v. *Neale* (1) an entry was made in the broker's book, and bought and sold notes were delivered, and the defendant returned the bought note, and contended that there was no contract till the note delivered was assented to. Lord ELLENBOROUGH held that neither party could recede from a contract after it was entered in the book, that the bought and sold note is not sent on approbation nor does it constitute the contract, it is only a copy of the entry, *which would be valid although no bought or sold [*109] note was sent. In *Grant* v. *Fletcher* (2) the plaintiff proved a verbal contract of purchase by the broker, and, to comply with the statute, gave in evidence an unsigned entry in the broker's book, and imperfect bought and sold notes; and a nonsuit was supported, because these imperfect instruments did not constitute a sufficient memorandum in writing of the bargain. In the judgment, it is stated that the entry in the broker's book is the original, and the bought and sold notes ought to be copies of it, and that a valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed: the COURT therefore was far from holding the notes, if delivered, to be the sole evidence of the contract. In *Goom* v. *Aflalo* (3) the broker had made an unsigned entry in his book, and had delivered to the parties signed bought and sold notes; it was objected that the entry in the book was the original, and that therefore the notes were inadmissible; and this objection was only overruled after argument on a special case. The COURT therefore was still far from recognising the doctrine that bought and sold notes are the contract itself. In *Thornton* v. *Meux* (4) ABBOTT, Ch. J. states that he used to think the broker's book the proper evidence of the contract, but he afterwards changed his opinion, and held, conformably with the rest of the COURT, that the copies delivered to the parties were the evidence of the contract they had entered into. It is obvious that this ruling does not follow from the judgments that had lately preceded it; it avows a late change of opinion; it was not acted on in *the case, so as to nonsuit [*110] the plaintiffs thereon, but the trial proceeded, and the plaintiffs were nonsuited on another ground; and therefore there was no

(1) 2 Camp. 337. [See 30 R. R. 263.]
(2) 29 R. R. 286 (5 B. & C. 436).
(3) 30 R. R. 262 (6 B. & C. 117).
(4) 31 R. R. 711 (Moo. & Mal. 43).

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opportunity to review the ruling in banc: and both the last cases are expressed as if a contract in writing was necessary for a contract of sale of chattels. In *Hawes* v. *Forster* (1) the contract, as stated in the bought and sold notes, varied from the contract as stated in the broker's book. On the first trial the plaintiffs' note only was in evidence and the broker's book was excluded. On the second trial, the plaintiffs relied on both the notes, with the evidence of some merchants stating that they always looked to the bought and sold notes as the contract, and that, if the note was not consonant to their direction to the broker, they returned it; the defendants relied on the entry in the broker's book: the jury were directed to find for the plaintiffs if the bought and sold notes in their opinion constituted the contract; and they found for the plaintiffs. This case ought not to be taken to establish the general proposition of law, that the notes in all cases constitute the contract. The verdict may well be supported upon the facts of the case, as the acceptance of the notes without objection was evidence for the jury of mutual assent to a contract upon the terms expressed in those writings, which agreed. This view is explained by PARKE, B. in *Thornton* v. *Charles* (2), where he says, speaking of *Hawes* v. *Forster* (1): "The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents, having been delivered to each of the parties after signing the entry in the book, [*111] constituted evidence of a new contract *made between the parties, on the footing of those notes. That case may be perfectly correct; but it does not decide, that if the bought and sold notes disagree, or there be a memorandum in the book made according to the intention of the parties, that memorandum, signed by the broker, would not be good evidence to satisfy the Statute of Frauds." The same learned Judge expresses himself to the same effect in *Pitts* v. *Beckett* (3). It is clear also that, if, according to the opinion of the witnesses, there is a right to return the note if contrary to instructions, the keeping of the note makes it binding, and not the signature.

These are the principal authorities cited by Mr. Smith On Mercantile Law (4), in support of the principle now discussed: and from this review I gather that, in the greater number of the cases the doctrine, that bought and sold notes are the sole evidence of the

(1) 42 R. R. 803 (1 Moo. & Rob. 368).
(2) 60 R. R. 896 (9 M. & W. 804, 807).
(3) 67 R. R. 798 (13 M. & W. 743).
(4) Smith, Merc. L. 452, 4th ed.

contract, is not recognised, nor was the point decided that other evidence of the contract and of a compliance with the statute is inadmissible, if bought and sold notes have been delivered which disagree. And, if the principle is not established by direct authority, the manifest evil resulting from it is a strong ground for believing that it is not founded on law.

Then, if other evidence of the contract, and of a compliance with the statute, was admissible, the second question raised by the defendant remains to be considered, namely whether there was sufficient evidence to sustain the verdict for the plaintiff. Upon this point I think the jury were warranted in inferring that the substance of the contract was as alleged in the amended declaration *and as stated in the defendant's note. The broker who made the [*112] contract appears to have so understood it, as he so expressed it at the time; the defendant, with whom he made it, probably so understood it, as he kept the note in that form without objection, and treated for a compromise on the assumption that he was bound thereby, and produced it at the trial as the contract. The plaintiff might well so understand it; for, as Dunlop's iron was a Scotch iron, the article which he intended to deliver was the article which the defendant intended to buy. There is no evidence that Scotch iron made by Dunlop was better than any other Scotch iron: on the contrary, it is probable from the conduct of the parties that the mention of Dunlop's name was an immaterial accident, not affecting the substance of the bargain. As, in the case of the purchase of wheat or other article of usual supply by its known denomination, if the dock where it was stored, or the ship in which it was brought, was mentioned in one note and omitted in another, the ommission of the place would I presume be held immaterial, so the omission of the manufacturer of Scotch iron in the defendant's note ought to be held immaterial if the subject of his purchase was intended to be Scotch iron; and his conduct is good evidence of such intention. If the evidence was that the defendant had proposed to buy Scotch iron, and that the plaintiff had proposed to sell him the article he wanted, namely Dunlop's, and the defendant had described his contract to be a purchase of Scotch iron in a memorandum made at the time, the jury would infer that Scotch iron was of the substance of the contract. The evidence now in the case appears to me to warrant the same conclusion. If the substance of the contract was as alleged in the defendant's *note, that note alone would be a [*113] sufficient memorandum of the bargain signed by an agent within the

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statute. The note delivered to the defendant was held sufficient by Lord KENYON in *Rucker* v. *Cammeyer* (1): one note only was offered in evidence by the plaintiffs in *Powell* v. *Divett* (2); and no objection was made on that account: one note alone was held by Lord DENMAN to be sufficient in *Hawes* v. *Forster* (3): one note, signed by the defendant, was held sufficient in *Rowe* v. *Osborne* (4), though it varied from the note signed by the plaintiff's broker which had been sent to the defendant. But it is not necessary to discuss whether one note alone would be a sufficient memorandum; for, if the substance of the contract was as is alleged, the notes did not substantially vary. As it was held, in *Bold* v. *Rayner* (5), that several apparent differences in the terms of bought and sold notes might be reconciled by evidence of mercantile usage in respect of those terms, so, where two descriptions are used in those instruments of that which, in the intention of the parties, may be the same article, I think the apparent discrepancy may be removed by evidence of such intention, and that, if both notes were essential to the plaintiff's case, both may be reconciled upon this evidence and held valid; they not being inconsistent as was the case in *Thornton* v. *Kempster* (6).

If it is further objected, for the defendant, that the question of ratification was left to the jury instead of asking them what was the substance of the contract, it appears to me that the jury intended

[*114] to find that the *contract was as alleged in the declaration, and expressed in the bought note: but, if not, this objection would not warrant the entry of a verdict for the defendant, which is the present rule; if the point can be resorted to at all, it goes to a new trial only. For these reasons my opinion is against the defendant on this second ground also: and I think his rule ought to be discharged.

PATTESON, J., after stating that it was unnecessary to recapitulate the facts, as he adopted the full statement in the judgment of LORD CAMPBELL, Ch. J., proceeded as follows:

The Statute of Frauds (7) requires that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully

(1) 1 Esp. N. P. C. 105.
(2) 13 R. R. 358 (15 East, 29).
(3) 42 R. R. 803 (1 Moo. & Rob. 368).
(4) 18 R. R. 754 (1 Stark. N. P. C. 140).
(5) 46 R. R. 322 (1 M. & W. 343; S. C. Tyr. & G. 820).
(6) 15 R. R. 658 (5 Taunt. 786).
(7) 29 Car. II. c. 3, s. 17.

authorized. The question is, Whether in this case there was any such note or memorandum in writing signed by the defendant or his agent? If there was, I take it to be clearly immaterial whether there was any such note or memorandum signed by the plaintiff (see *Egerton* v. *Mathews* (1), where the memorandum was signed by the defendants themselves, not by a broker or agent, and none was signed by the plaintiff, yet it was held that the statute was satisfied); for I consider that the memorandum need not be the contract itself, but that a contract may be made without writing; and, if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied. Still it is plain that, if the original contract was itself in writing signed by both parties, that would be the binding instrument *and [*115] no subsequent memorandum signed by one party could have any effect. In this case, the contract was made by a broker acting for both parties; but such contract was not in writing signed by him or them. If there be any writing to satisfy the statute, it must be some subsequent memorandum in writing signed by the defendant or his agent. There are subsequent memoranda in writing signed by the broker, namely the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant; the sold note to the seller, the plaintiff; each of them in the language used purports to be a representation, by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent in order that he may be bound thereby; for then it would have been delivered to the seller, and not to the buyer; and *vice versâ* as to the sold note. Can then the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him the buyer thereby? The very language of it shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his book and sign all contracts made by him: and, if the broker had made such signed entry, I cannot doubt, notwithstanding the cases and *dicta* apparently to the contrary, that such memorandum would be the binding contract on both parties. In the case of *Hawes* v. *Forster* (2) there was such a memorandum *signed in the [*116]

(1) 8 R. R. 489 (6 East, 307). (2) 42 R. R. 803 (1 Moo. & Rob. 368).

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broker's book; there were also bought and sold notes, tallying with each other, but varying from the book. On the first trial of that case, Lord DENMAN held that the bought note, produced by the buyer (the plaintiff), was sufficient, and was the proper evidence of the contract, and not the book, and that no notice to produce the sold note need be given to the defendant. The COURT, on motion, granted a new trial, holding that this evidence was not the proper evidence of the contract, unless there was a custom of trade in London that the bought and sold notes, and not the signed broker's book, were the contract, and considering that such custom had not been sufficiently inquired into. The case is so explained by PARKE, B. in *Thornton* v. *Charles* (1), and again in *Pitts* v. *Beckett* (2); and my own note of the case (I having been a member of the Court which granted the new trial) (3) is in entire conformity with that explanation. On the new trial, the jury found the custom that the bought and sold notes constituted the contract and not the broker's book: a bill of exceptions was tendered; but the defendant did not persist, and submitted to the verdict. Possibly, if he had, it might have been held that the bought and sold notes, acquiesced in, constituted a new contract; but that they could ever be treated under such circumstances as the original contract seems to me impossible.

[117] However, in the present case, there was no signed memorandum in the broker's book: therefore the bought and sold notes together, or one of them separately, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied.

If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum: the Court cannot possibly say, nor can a jury say, which of them is to prevail over the other; read together they are inconsistent, assuming the variance between them to be material: and, if one prevails over the other, that one will be the memorandum, and not the two together.

If, on the other hand, one only of these notes is to be

(1) 60 R. R. 896 (9 M. & W. 802).

(2) 67 R. R. 798 (13 M. & W. 743, 746).

(3) The case was argued, before Denman, Ch. J., Littledale, Parke and Patteson, JJ., on May 30th and June 3rd, 1833, by *Sir James Scarlett*, *D. Pollock*, and *R. Gurney*, for the plaintiffs, and *Sir John Campbell*, Solicitor-General, and *Blackburne*, for the defendants. DENMAN, Ch. J. delivered judgment on June 12th. No decision having been pronounced on the question of law, the case was not reported.

considered as the memorandum in writing signed by the defendant's agent and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think that either of them by itself can be so treated. In no one of the cases has the Court, or a Judge at Nisi Prius, held that it could: all that Lord DENMAN held in *Hawes* v. *Forster* (1), on the first trial, was that proof of one was sufficient without notice to produce the other, thereby holding only that the other must be taken to correspond with that produced, until the opposite party produced the other and showed the variance. But on the second trial notice to produce the other was given, and it was produced, and the two corresponded. In *Goom* v. *Aflalo* (2) there was no variance at all; and the only question was whether, as there was an unsigned memorandum *in the broker's book, [*118] the bought and sold notes could be treated as a memorandum; and the COURT held that they could. All three corresponded in that case.

If this were *res integra*, I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds; but I consider that point to be too well settled to admit of discussion; yet there is no case in which they have varied, in which the Court has upheld the contract; plainly showing that the two together have been considered to be the memorandum binding both parties: the reason of which is to my mind, I confess, quite unsatisfactory; but I yield to authority.

I do not go through and examine all the cases on this subject: they are collected in the last edition of Smith's Mercantile Law by Mr. Dowdeswell; and they show that it has invariably been held that, where the bought and sold notes are resorted to as the contract, or as the memorandum of the contract, and they vary in any material point, there is no writing to satisfy the statute.

It seems to me, therefore, that the only question to be determined in this case is, Do the bought and sold notes differ in any material point? Now the one is "Dunlop's Scotch iron," the other "Scotch iron" generally: the one would be complied with by delivery of Scotch iron of any person's manufacture, possibly greatly inferior to that of Messrs. Dunlop: the other ties the parties down to Dunlop's; possibly again that may be inferior to some

(1) 42 R. R. 803 (1 Moo. & Rob. 368).

(2) 30 R. R. 262 (6 B. & C. 117).

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other Scotch iron. How is it possible to read the two notes together, and say that they mean the same thing, or to say that, if you incorporate the one note with the other, that which specifies Dunlop's iron will not immediately prevail over that which does not? I cannot but *think that they are as much at variance as the bought and sold notes in *Thornton* v. *Kempster* (1), where the one was "Riga" and the other "Petersburg" hemp, and where the Court of Common Pleas held that there was no contract, independent even of the Statute of Frauds. The broker indeed stated in his evidence that he made the original contract verbally for Dunlop's Scotch iron; but how can that evidence make the bought note, delivered to the defendant for Scotch iron generally, to be a memorandum signed by the defendant's agent binding the defendant? The question is, not whether either of the notes corresponds with the contract originally made by word of mouth, but whether either of the notes, separately, *per se*, be a signed memorandum binding upon either party.

[*119]

Upon the whole therefore, however much I may regret that such an objection should prevail, I feel bound to say that in my opinion there was no evidence in this case of any contract binding on the defendant.

LORD CAMPBELL, Ch. J.:

I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended the action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies, till within a few days before the trial. But it appears to me that we cannot refuse giving effect to this objection without disregarding *the Statute of Frauds, without overturning decided cases, and without danger of introducing uncertainty and confusion into the rules for enforcing mercantile contracts of buying and selling.

[*120]

The plaintiff in his declaration set out the following written document, stated to be a "sold note" of certain goods agreed to be purchased from him by the defendant.

"26, LOMBARD STREET, LONDON, February 26th, 1849.

"Sold Charles Dickson Archibald, Esq., 48, Upper Harley Street.

(1) 15 R. R. 658 (5 Taunt. 786).

for Messrs. Sievewright, Watson & Co., Glasgow, 500 tons Messrs. Dunlop, Wilson & Co.'s pig iron, 3-5ths No. 1 and 2-5ths No. 3, at 52 shillings per ton, free on board at Troon, payment cash within one month from this date against orders of delivery." This professed to be signed by "WM. RICHARDSON, broker."

The declaration in the usual form averred that the iron was duly tendered to the defendant, but that he refused to accept or to pay for it. The only material plea was *Non assumpsit.* William Miller, being called as a witness, swore as follows. "I am a metal broker in the city: plaintiff carries on business at Glasgow under the firm of Sievewright, Watson & Co. I received instructions from him to sell 500 tons of Dunlop, Wilson & Co.'s pig iron. I sold it to the defendant. I saw the defendant in London; he gave me a verbal authority to make the purchase for him. I agreed with him that he was to be the purchaser of 500 tons of Dunlop, Wilson & Co.'s iron. The name of Sievewright, Watson & Co. was mentioned as the sellers. On the 26th of February I wrote a contract and sent it to the defendant in a letter." (The bought note being called for, it was *produced by the defendant; and it corresponded with the sold note set out in the declaration, except that, instead of "500 tons Messrs. Dunlop, Wilson & Co.'s pig iron," it stated "500 tons of Scotch pig iron." The bought note being read, the witness continued) "This was inclosed in a letter of 26th February, and sent to the defendant in Upper Harley Street. I sent to the plaintiff the same day a sold note" (a copy of it was admitted and read as set out in the declaration). "Dunlop, Wilson & Co. are manufacturers of iron in Scotland; and their iron is Scotch iron." [*121]

The defendant's counsel insisted that there was no binding contract between the parties, there being a material variance between the bought and sold notes; for, according to the bought note, the seller would perform his obligation by tendering 500 tons of pig iron made by any manufacturer in any part of Scotland, whereas by the sold note the buyer might demand 500 tons of pig iron made by Dunlop, Wilson & Co.; which might be of a peculiarly good quality and of superior reputation in the market. I intimated an opinion that the variance was material, and that, as there was no entry in the broker's book signed by him, and the plaintiff had proposed to prove the contract by the bought and sold notes, the variance was fatal. The plaintiff's counsel then said

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that he had clear evidence to prove that the defendant had subsequently ratified the contract; and, objection being made that he could not have ratified the contract as set out in the declaration, I permitted the declaration to be amended according to the terms of the bought note.

[*122] Miller, the broker, being recalled, after stating that he *had the delivery orders for the 500 tons of iron ready to be handed over to the defendant on the 26th of March, said: "I saw the defendant about the end of March. On the 4th of April he agreed that I should propose to the plaintiff to take a bill at four months, and the delivery orders to be lodged as a security at the Union Bank. The price of iron had then fallen 5*s.* a ton. Before the 29th of March, the defendant had given me unlimited authority to get the transaction settled as I thought fit."

There were read a letter from the defendant to Richardson of 5th April, saying: "You must manage the iron speculation as you think fit;" a letter written by Richardson to the plaintiff, saying that "Mr. Archibald agreed to give a bill at four months;" the plaintiff's answer refusing to take a bill at four months, but offering to take one at three months; another letter written about the same time by the defendant to Richardson, saying: "I hope you will conduct it to a successful issue;" and further letters between the parties, continuing the negociation till 27th October, 1849, when the defendant denied his liability. I left the question to the jury, Whether the defendant had ratified the contract sent to him, contained in the bought note? The jury found that he had; whereupon a verdict was entered for the plaintiff for 125*l.* damages, with liberty for the defendant to move to enter the verdict for him if the Court should be of opinion that there was not evidence to prove the declaration as amended.

Having heard the rule obtained for this purpose learnedly argued, I do not think that there was any sufficient evidence of ratification. Nothing having such a tendency was done by the defendant
[*123] before the 26th of March, the *day on which he ought to have performed the contract and on which he broke it. What constituted the ratification? And what date is to be given to it? There never was any reference by the defendant to the terms of the bought note more than of the sold note. The variance between them was not known to him till after the action was brought. Nor was there ever any assent by the plaintiff to accede to the terms of the bought note, whereby he would have become bound to deliver Dunlop, Wilson

& Co.'s pig iron. The sold note, containing different terms, instead of being discarded by the plaintiff, was actually declared on by him, and was set up by him as the true contract till the declaration was amended. The plaintiff likewise sought to recover under a count for goods bargained and sold: but this could not avail him; for the defendant never accepted the goods; and the contract was not for the sale of any specific goods, the property in which could be considered as transferred to him. Recurring to the special count, the plaintiff attempted to support it by the parol agreement, alleged to have been entered into between the broker and the defendant, using the bought note as a memorandum of the agreement to satisfy the Statute of Frauds.

In the first place, there seems a difficulty in setting up any parol agreement where the parties intended that there should be, and understood that there was, a written agreement: what passed between the defendant and the broker previous to the 26th of February seems to me only to amount to an authority from the plaintiff to the broker to enter into the contract: and Miller himself says: "On the 26th of February I wrote a contract and *sent it to the [*124] defendant. I sent a sold note the same day to the plaintiff." Again, the memorandum, under the 17th section of the Statute of Frauds, must be signed by the party to be charged, or his agent. But, assuming that the parol agreement was the contract, and that, when Miller wrote the bought note, it was only to tell his principal what he had done, there is a difficulty in saying that, being *functus officio* as far as making the bargain was concerned, he had any authority to sign the memorandum as the defendant's agent, and thereby to charge him. But, if he had, can this be said to be a true memorandum of the agreement? We are here again met by the objection of the variance, which is as strong between the parol agreement and the bought note as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note; and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected, and the declaration was amended. I by no means say that where there are bought and sold notes they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book signed by him, I should hold without hesitation, notwithstanding

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some *dicta*, and a supposed ruling of Lord TENTERDEN in *Thornton* v. *Meux* (1) to the contrary, that this entry is the binding contract between the parties, and that a *mistake made by him, when sending them a copy of it in the shape of a bought or sold note, would not affect its validity. Being authorized by the one to sell, and the other to buy, in the terms of the contract, when he has reduced it into writing and signed it as their common agent, it binds them both, according to the Statute of Frauds, as if both had signed it with their own hands; the duty of the broker requires him to do so; and, till recent times, this duty was scrupulously performed by every broker. What are called the bought and sold notes were sent by him to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. This clearly appears from the practice still followed of sending the bought note to the buyer, and the sold note to the seller; whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; if there be any material variance between them, they are both nullities, and there is no binding contract. This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases that I could not venture to contravene it, if I did not assent to it; but, where there is no evidence of the contract unless by the

[*126] bought and sold notes sent by the broker *to the parties, I do not see how there can be a binding contract unless they substantially agree; for contracting parties must consent to the same terms; and where the terms in the two notes differ there can be no reason why faith should be given to the one more than the other. This is certainly a most inconvenient mode of carrying on commercial transactions; from the carelessness of brokers and their clerks mistakes not unfrequently arise, of which unconscientious men take advantage; and no buyer or seller can be safe unless he sees the sold or bought note as well as his own; a precaution which the course of business does not permit to be taken. But these inconveniences can only be remedied by the Legislature enforcing upon

(1) 31 R. R. 711 (Moo. & Mal. 43).

the broker the faithful performance of his duty in entering and signing the contract in his book.

In the present case, there being a material variance between the bought and sold note, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and, if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with; and I agree with my brother PATTESON in thinking that the defendant is entitled to the verdict.

My brother WIGHTMAN, who heard the argument, but is now engaged elsewhere in the discharge of a public duty, has authorized me to say that he has read this judgment and that he entirely concurs in it. But, the COURT being divided, instead of making the rule absolute to enter the verdict for the defendant, we think that a nonsuit should be entered, so that the plaintiff may *have [*127] the opportunity to bring a fresh action, and by a special verdict, or a bill of exceptions, to take the opinion of a court of error on his rights.

Rule absolute to enter a nonsuit.

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1851. *May* 27. *June* 4.

(17 Q. B. 127—149; S. C. 20 L. J. Q. B. 460; 15 Jur. 877.)

[127]

On a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more as the purchaser has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the supply, such vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract.

And proof of such notice by the purchaser will entitle the plaintiff to recover, on a count alleging that he was ready and willing to perform the contract, and that defendant refused to accept the residue of the goods, and prevented and discharged plaintiff from supplying them, and from further executing the contract.

Such notice is a prevention, though there be no other act of obstruction.

And it is a discharge, though given by a corporation without writing under seal, if it be given by their agent, appearing by the evidence to have acted with their authority, and to have represented them, in the transactions with the vendor.

Where, by the terms of such a contract, the goods were to be delivered

(1) Cited, *Byrne* v. *Van Tienhoven* (1880) 5 C. P. D. 350, 49 L. J. C. P. 316.—A. C.

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at stated periods, but they were not all delivered at the respective times, the purchasers not countermanding them, but requesting, from time to time, that the supply might be delayed, and finally the purchasers refused to accept any more: Held that damages might be given for the whole quantity remaining on hand, though consisting in part of quantities which, without being actually countermanded, had, by desire of the purchasers, been kept back at the times appointed for delivery. And that the jury were properly directed to give such damages as would leave the plaintiffs in the same situation as if the defendants had fulfilled their contract.

CASE. The declaration stated that, on 14th December, 1846, defendants, then being about constructing the above-named railway, required in that behalf, and advertised for, certain railway chairs to be supplied to them according to a certain specification then made and published by defendants, and containing and stating
[*128] therein &c.: The specification was then set *forth, describing the required make, weight and composition of the chairs, and that "the quantity of chairs required was to be 900 tons of joint and 3,000 tons of intermediate chairs, and which were to be delivered at such places and in such proportions as hereinafter described; to wit to be delivered out of barges and placed upon a wharf at Radcliffe-upon-Trent" &c. (other places of delivery for various quantities were then stated); "in the month of February, A.D. 1847, 60 tons at the Grantham Canal Wharf" &c. (naming quantities and places (1)), "in the month of March in the year aforesaid" &c.: the specification, as recited, then went on to require further deliveries at places and in quantities named, in April, and from thence monthly till November, 1847, inclusive, and again from January to May, 1848, inclusive. The tender was to state a price per ton; payments to be made by the directors of the Company one month after delivery, on production of a certificate from the person appointed by the Company to receive and inspect the chairs that the contract (for the portion) had been duly performed: the engineer to "have full power to alter the deliveries in any way or proportion to the different places before specified, by sending information to the contractor from time to time of the manner in which such deliveries were to be made" (2): the contractor to be paid according to the prices set forth in his tender. The declaration then averred that plaintiffs, having notice of the premises, did
[*129] thereupon afterwards, viz. on *&c., propose to defendants to supply

(1) The quantities were to be from 100 to 356 tons in the whole, per month: places of delivery, Grantham Canal Wharf, Bottesford Wharf, Radcliffe Wharf, High Bridge Wharf, and Boston.

(2) These words were taken nearly *verbatim* from the specification.

them with 3,900 tons of cast iron chairs manufactured from strong mixed iron, subject to the conditions and stipulations set forth in the said specification, and in such proportion of joint chairs to intermediate or single chairs as described therein as aforesaid, and also to deliver the same at such places and in such quantities as stated and described as aforesaid, free from every other charge, and at the rate &c. (specifying the rates): And thereupon afterwards, viz. on 28th December, 1846, by a certain contract or memorandum of agreement then made between plaintiffs of the one part and defendants of the other part, and then sealed with the common seal of the defendants and delivered so sealed as aforesaid to the plaintiffs, and which &c. (*profert*), it was agreed by and between plaintiffs and defendants that plaintiffs should and would execute and perform the said proposal according to the conditions and stipulations therein set forth and referred to as aforesaid, and subject to the said specification. And defendants did thereby agree to pay plaintiffs for the said chairs after the rate and in manner above mentioned. Averment that plaintiffs afterwards, viz. on &c., and on divers other days &c., did, in pursuance and part performance of the said contract on their part, deliver to defendants, and defendants did accept and receive of and from plaintiffs, 1,787 tons of such chairs as aforesaid: and, although one month from the said respective deliveries of the said chairs had respectively elapsed before the commencement of this suit, and plaintiffs afterwards, and after the expiration of one month as aforesaid, and before the commencement of this suit, viz. &c., produced *such written certificates as aforesaid to the defendants in respect of the quantities of chairs so delivered as aforesaid, nevertheless defendants have not paid &c., and a large sum, viz. 12,100*l.*, is due and unpaid from them to plaintiffs for and in respect of the said chairs so delivered &c.

[*130]

And plaintiffs further say that, although they were always, from the time of the making of the said contract until such refusal and wrongful discharge by defendants as hereinafter mentioned, and thence, hitherto, ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, and to perform and fulfil the said contract in all things on their part and behalf to be performed and fulfilled, whereof &c. (notice to defendants), and although defendants, in pursuance and part performance of the said contract on their part, have accepted and received of and from plaintiffs a certain quantity of the said chairs, to wit 1,787 tons

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thereof, and although the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid hath long since elapsed, nevertheless defendants afterwards, to wit during the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid, to wit the 31st January, 1848, wrongfully and injuriously and wholly refused, and have thence hitherto wholly refused, to accept or receive of or from plaintiffs the residue of the said chairs so agreed to be supplied to and received by defendants as aforesaid, or any part thereof, according to the form and effect of the said contract or otherwise howsoever, and then and have thence hitherto wholly
[*131] and wrongfully prevented *and discharged plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them the plaintiffs. Whereby plaintiffs have lost all the profits &c., and have been put to costs in providing &c. for complete execution of the contract, and were obliged to discharge certain persons (named) from contracts which the plaintiffs had entered into with them for the supply of iron to be used by plaintiffs in making the said chairs, and to pay them compensation.

Plea 1. After *oyer* of the specification and agreement (the material parts of which appear sufficiently by the declaration): As to the first breach, except so far as the same relates to 159*l.*, parcel &c.; payment by defendants to plaintiffs, and acceptance by them in full satisfaction &c.: verification. Plea 2. As to the 159*l.*, payment into Court of that sum: which the plaintiffs accepted, and gave a written admission that it covered the balance due for chairs actually delivered.

Plea 3. As to so much of the said declaration as alleges that plaintiffs were ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, defendants say that plaintiffs were not ready and willing to execute and perform the said proposal according to the said conditions and stipulations and subject to the said specification, in manner and form &c. Conclusion to the country. Issue thereon.

Plea 4. As to so much of the declaration as charges defendants with having, during the time limited and appointed for the execution and performance of the said contract by the plaintiffs, refused to accept or receive the said residue of the said chairs, and prevented
[*132] and *discharged the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by

them the plaintiffs, defendants say that they did not during the said last mentioned time refuse to accept or receive the said residue, nor did they prevent or discharge the plaintiffs from supplying the said residue and from the further execution and performance of the said contract by the plaintiffs in manner and form &c. Conclusion to the country. Issue thereon.

Replication to plea 1. That defendants did not pay &c., nor did plaintiffs accept &c., in manner and form &c. Conclusion to the country. Issue thereon.

On the trial, before Coleridge, J., at the Nottingham Spring Assizes, 1851, it appeared that the plaintiffs, after the agreement declared upon, bought premises, made contracts for iron, and, at considerable expense, and by incurring various liabilities, put themselves in a situation to supply the 3,900 tons of iron chairs. The supply was begun: but in September, 1847, when the plaintiff's bookkeeper, Smith, called upon the Company's engineer for money, the engineer, who used to give directions on their behalf as to the delivery of the chairs, requested that the plaintiffs would go on very slowly with the supply, as he did not know how to do, the calls not being paid, and he did not know how far the line would be carried out. Part of the line for which the chairs had been ordered (ending at Boston) was ultimately abandoned. In January, 1848, the engineer stopped the supply for a time, saying he would let the plaintiffs know when more chairs were wanted. The plaintiff's establishment for manufacturing the chairs was kept up during the suspension, which continued till August. Then the engineer said the Company could *take a few more, but plaintiffs were to go on [*133] slowly. They did so till February, 1849, and were then again stopped till April, when the engineer desired to have a boat load (if plaintiffs had as many) sent to Radcliffe Wharf, which was done. No more were sent or asked for till December, 1849, when Smith called upon the engineer for money, and he enquired whether plaintiffs had any chairs. Smith replied that they had some, which had been made a long time. The engineer said that, if plaintiffs had 100 tons, they might send them, but they were not to make any more, as they would not be wanted, for the defendants had as many as were necessary to carry the line to Grantham. Plaintiffs sent all they had, about 53 tons: and no more were sent or required afterwards. During the supply the payments were not made punctually according to contract; nor had the plaintiffs delivered the stipulated quantities of chairs at the appointed times

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respectively; which omission on their part they attributed to the interruptions above stated. A large stock of iron remained on the plaintiffs' hands; and, besides loss in the disposal of it, they had to pay money for breaking off engagements which they had themselves made for the purpose of executing this work. The quantity of chairs delivered was 1,787 tons.

In defence, an endeavour was made to show that the plaintiffs had not the requisite means to complete their contract, and that the delays and final cessation took place with their concurrence. It was also urged that the engineer was not shown to have had such authority as would make his acts binding on the Company. These points were left to the jury, who decided them in favour of the plaintiffs.

[*131] It was further contended that the averment by plaintiffs *in the declaration, of readiness and willingness to perform their contract, was not borne out, inasmuch as the plaintiffs had not offered to deliver, nor had ever made, the residue of the chairs; nor was it proved that the defendants had prevented and discharged plaintiffs from supplying such residue, since it did not appear that the Company had impeded the delivery by any active interference, or had countermanded it under their seal or by any authoritative communication. On the first of these points, COLERIDGE, J. said: There is no evidence of any refusal to accept; no evidence of their having said, for example, "We insist upon your completing the contract, and, if you do not, we shall bring an action." There is no offer to send the chairs, and no refusal to accept; nor is there the slightest ground for believing that the plaintiffs have ever made these chairs: but I think the law is not so unreasonable as to compel parties to be at the expense of making these chairs if those who contracted to purchase have in truth told them they would not accept them; and I think the defendants had given very effective notice that they were not to be made. On the second point his Lordship said, after reading the material statements of the witnesses: Upon this evidence you are to say whether or not the directors refused to accept. Why, they certainly have not in form; but do they, by any intervention on their part, cause the plaintiffs not to go on to complete the delivery? If you think that they did, then that issue, like the former, should be found for the plaintiffs; but, if you think not, then that issue should be found for the defendants. With respect to the authority of the engineer to suspend and stop the work, and the responsibility of the Company for his directions,

though not warranted under their seal, the learned Judge observed: This contract *was entered into under seal by the Ambergate Railway Company, a corporation, on the one part, who are under certain disabilities and disadvantages which do not attach to other people: but the corporation all the way through seem to have been represented by certain individuals; and the most important person with whom they (plaintiffs) have had to do is the engineer; and I think rightly and properly, and that he was a necessary man to go between these parties. Without his certificate the plaintiffs could not get any money; and, before he would certify, he would have to be satisfied that they had a perfectly flat chair (1). I shall advise you very much to consider this case as one, in the particular parts to which I shall draw your attention, in which you should look upon every thing done by the engineer as if it was done by the Company itself, as far as the plaintiffs are concerned. As to the damages, his Lordship said that the plaintiffs, if they had a verdict, were entitled to be put into the same situation as if they had completed their contract; and he suggested modes in which the damage, upon the whole quantity undelivered, might be estimated, but without giving any actual direction upon this subject.

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The learned Judge read over to the jury the material parts of the evidence on all the points; and they found a verdict for the plaintiff, damages 1,800*l.*

Macaulay, in the ensuing Term, moved for a new trial on the ground of misdirection on the points of readiness and willingness, and of prevention; and he also objected to the summing up as to the authority of the engineer, and on the question how far the plaintiffs *were shown to have concurred in the stopping of their work. He cited *West* v. *Blakeway* (2), *Phillpotts* v. *Evans* (3) and *Ripley* v. *McClure* (4). And he contended that the damages were excessive, inasmuch as the verdict was given in respect of all the chairs, whereas some had been undelivered on the appointed days, before the final stoppage, and without any compulsion upon the plaintiffs not to deliver them. A rule *nisi* was granted. [*136]

Humfrey and *Willmore* now showed cause (5):

The plaintiffs proved that they were ready and willing to deliver

(1) The specification required that the under side of the chair should be "perfectly flat and even on the surface."

(2) 58 R. R. 563 (2 Man. & G. 729).

(3) 52 R. R. 802 (5 M. & W. 475).

(4) 80 R. R. 593 (4 Ex. 345). See *McClure* v. *Ripley*, in Ex. Ch., 80 R. R. 606 (5 Ex. 140).

(5) Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

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all the chairs, if the defendants had not prevented them. There could be no obligation to tender them, after the Company had said that they would not be received. The defendants will be obliged to contend that their contract could not be broken but by an order under seal.

(LORD CAMPBELL, Ch. J.: That it could not be altered but under seal.

PATTESON, J.: The argument will apply only to the discharging.)

The plaintiffs had no means of obtaining a discharge under seal. Discharge of the plaintiffs, or refusal to fulfil their own contract, are, for the present purpose, the same thing. To say that a seal was necessary to the discharge is to extend the law as to the making of contracts by a Company to the breaking of them, and to require a formal contract for both. But, further, the averment put in issue here is that the defendants "refused to accept" the residue of the chairs, and "prevented and discharged" plaintiffs from supplying
[*137] them. It is enough if the refusal and *prevention be proved. They are an act *in pais*, equivalent to a discharge. Otherwise the most formal tender of the chairs would not have entitled the plaintiffs to sue, unless there had been an express discharge by the Company, and that regularly accepted by the plaintiffs. Refusal, and the continuance of it, were the questions which went to the jury in *Ripley* v. *McClure* (1); and it was held that their finding for the plaintiff entitled him to recover in an action of assumpsit for discharging him from delivery of a cargo and refusing to purchase it according to contract.

(LORD CAMPBELL, Ch. J.: You say that it is not necessary here to show that the contract was varied or put an end to: that the act of the defendants was a flat breach of the contract, which dispensed with your performance.)

That is so. The ability of the plaintiffs, if they had not been prevented, was amply proved. (The plaintiffs' counsel commented upon the cases of *West* v. *Blakeway* (2) and *Phillpotts* v. *Evans* (3), cited in moving for the rule; but these are so fully discussed in the judgment of the COURT, who took the same view of them, that a further notice of this part of the argument is unnecessary.) As to

(1) 80 R. R. 593 (4 Ex. 345).
(2) 58 R. R. 563 (2 Man. & G. 729).
(3) 52 R. R. 802 (5 M. & W. 475).

the specific act of prevention here, the engineer was a person whose proceeding might bind the Company, if he had their authority; and this fact was affirmed by the jury. The Company's acts must be done through some individual agent: and the engineer, by refusing to certify for the purpose of warranting payment, might, individually, stop the further delivery.

(LORD CAMPBELL, Ch. J.: The Company never interfered; and that seems to have justified the jury in finding that his act was theirs.)

Glover v. *London and North Western Railway* **Company* (1) is an authority for the plaintiffs on this point. As to damages, the learned Judge did not dictate to the jury any particular mode of estimating them, but only laid down as matter of law that the plaintiffs should be put into the same situation as if the contract had been fulfilled; which was correct. [*138]

Macaulay and *Denison, contrà:*

The plaintiffs, in order to recover, were bound to prove a delivery or something equivalent; the equivalent relied upon was a discharge or prevention, which appear to have been treated at the trial as the same thing. That a mere dispensation by parol would not suffice is clear from *West* v. *Blakeway* (2): and the only modes in which the plaintiffs could exonerate themselves from the conditions precedent were either a competent dispensation or an actual prevention by the covenantee. "Discharge," in pleading, is taken to mean a discharge legally operative; that is, where the obligation is by deed, a discharge by deed: *Brymer* v. *Thames Haven Dock and Railway Company* (3). What amounts to legal prevention is shown in Com. Dig. Condition, (L 6). "So the performance of a condition shall be excused by the obstruction of the obligee: as if a condition be to build an house; and he, or another by his order, hinders his coming upon the land." Other instances are then given; and it is added: "But it ought to be an obstruction which disables the performance." What would or would not amount to a disability appears by (M. 5) of the same title.

(LORD CAMPBELL, Ch. J.: The examples *there regard conditions to enfeoff; I think they are not much to the present purpose.) [*139]

(1) 82 R. R. 568 (5 Ex. 66).
(2) 58 R. R. 563 (2 Man. & G. 729).
(3) 2 Ex. 549.

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There must be a prevention.

(LORD CAMPBELL, Ch. J.: Of what?

COLERIDGE, J.: Suppose a man said, "If you come for such a purpose, I will blow your brains out." That would be no physical prevention.

LORD CAMPBELL, Ch. J.: Such a threat might be used ten days before the act was to be done.)

Its effect must be judged of by a jury. In *West* v. *Blakeway* (1) TINDAL, Ch. J. thought that, if the plea had disclosed "an act which the lessor had done, or which he had compelled to be done," it would have been good. BOSANQUET, J. said: "I agree that if the covenantee prevent the performance of the covenant by an act of his own, his right of action for the breach of that covenant is destroyed. But the act, to constitute such a defence, must be the immediate act of the covenantee." And COLTMAN, J. said that the fallacy in the defendant's argument was its assuming "that there was an act done by the lessor by which the lessee was prevented from performing his covenant." Reference is there made to the case of *The Master of St. Catherine's* (2), where the breach of condition by the lessee was caused by an actual ouster and force on the part of the lessor, who afterwards sought to take advantage of the condition; but it clearly was considered that nothing short of such force would be an excuse. No direct authorities as to prevention have been found; but it is evident that there ought to be a prevention in fact, when the party alleging it was ready, and did all that lay in him, to perform his part of the contract.

(ERLE, J.: There is prevention by a series of acts.

COLERIDGE, J.: You would not admit such a waiver as was allowed
[*140] in *Ripley* *v. *McClure* (3).

LORD CAMPBELL, Ch. J.: According to your argument, even a notice under the common seal of the Company to send no more chairs would have been insufficient.)

That would be a discharge, not a prevention; and the proper mode of doing such act is pointed out by the Companies Clauses

(1) 58 R. R. 563 (2 Man. & G. 752). Rep. 91 b.
(2) Cited in *Frances's* case, 8 Co. (3) 80 R. R. 593 (4 Ex. 345).

Consolidation Act, 1845, 8 & 9 Vict. c. 16 (1). In *Ripley* v. *McClure* (2) the point of time at which the breach of contract took effect was held to be the time when the ship arrived at Belfast, and the cargo was to be delivered and accepted, no intermediate act remaining to be done. A previous refusal, unless the evidence had shown that it continued down to that time, would have been unimportant. The same conclusion may be drawn from *Phillpotts* v. *Evans* (3).

(LORD CAMPBELL, Ch. J.: According to your view, if the party who contracted to purchase were to say, "I am insolvent, and your finishing the article will be of no use," the vendor could not recover unless he finished and tendered it.

ERLE, J.: Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo: must the ship be sent, to return empty?

LORD CAMPBELL, Ch. J.: If it were law, it could not be sense (4).)

In *Planché* v. *Colburn* (5) the defendants had engaged the plaintiff to write a work for publication, but abandoned the publication when the work was partly completed; and the Court of Common *Pleas [*141] held that he might recover for so much as he had done, without having tendered the work. There it must have been considered that the contract was rescinded, and that the plaintiff might recover upon it for so much as he had been allowed to execute: upon the facts here, a rescinding cannot be assumed, and the plaintiffs, in order to recover, must have carried out the contract.

(COLERIDGE, J.: Could the contract be rescinded without consent of both parties? The judgment of BOSANQUET, J. in *Planché* v. *Colburn* (6) is against your view.

ERLE, J.: The Court there do not say that the contract was rescinded.)

(*Humfrey* referred to the observations on this case in *Goodman* v. *Pocock* (7); and ERLE, J. cited *Elderton* v. *Emmens* (8).)

(1) See sects. 92 *et seq.*
(2) 80 R. R. 593 (4 Ex. 345).
(3) 52 R. R. 802 (5 M. & W. 475).
(4) *Cook* v. *Jennings*, 4 R. R. 468 (7 T. R. 381) was here cited; but LORD CAMPBELL, Ch. J. said: That has nothing to do with this case.
(5) 34 R. R. 613 (8 Bing. 14).
(6) 34 R. R. 613 (8 Bing. 14); *S. C.* 1 Moo. & Sc. 51.
(7) 81 R. R. 705, 710 (15 Q. B. 576, 582).
(8) 6 C. B. in Ex. Ch. 160; reversing the judgment of C. P. in *Elderton* v. *Emmens*, 4 C. B. 479. Judgment of Ex. Ch. affirmed in Dom. Proc.: *Emmens* v. *Elderton*, 4 H. L. C. 624.

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The learned Judge in the present case told the jury to assume that the engineer's acts were authorized by the Company; but there was no evidence of their sanction.

(COLERIDGE, J.: Not by orders under seal; but there was other conduct that showed it.)

(The discussion as to the evidence, and the words used by the learned Judge, is omitted. Lord CAMPBELL, Ch. J. said: It was not a direction in point of law; and I should have advised the jury so myself.)

In considering what a corporation may authorize without seal, reference must be had to the nature and objects of the incorporation; that principle was acted upon in *Beverley* v. *The Lincoln Gas Light* [*142] *and Coke Company* (1), **Mayor of Ludlow* v. *Charlton* (2) and *Paine* v. *Strand Union* (3); and *Ridley* v. *Plymouth Grinding and Baking Company* (4) shows how strictly the Courts will examine the authority of individuals to bind a joint stock corporation instituted for the purposes of a special Act of Parliament.

(LORD CAMPBELL, Ch. J.: It appears here that, according to the course of the Company's business, it was left to the engineer to manage the affairs in question; and that in those they were represented by him.)

Cox v. *The Midland Counties Railway Company* (5) is another authority for the defendants on this point.

(LORD CAMPBELL, Ch. J.: There never was a case reported which admitted of less doubt.)

As to the damages. Until the first actual stoppage, in January, 1848, the plaintiffs might have delivered the chairs on the days specified; if any remained on hand by reason of their omission to do so, it was their own fault: and damages ought not to have been awarded to them for loss of profit on the whole amount finally undelivered, but only on that which they were prevented by express prohibition from delivering on the stated days. (They also contended that, on the amount for which damages might be claimed

(1) 45 R. R. 626 (6 Ad. & El. 829).
(2) 55 R. R. 794 (6 M. & W. 815).
(3) 70 R. R. 503 (8 Q. B. 326).
(4) 76 R. R. 742 (2 Ex. 711).
(5) 77 R. R. 623 (3 Ex. 268).

consistently with this objection, the assessment was not justified by the evidence.)

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a later day of the Term (June 4th), delivered the judgment of the COURT:

We are of opinion that the verdict found for the plaintiffs ought not to be disturbed. As to the supposed misdirection: the learned Judge at the trial did not *direct the jury that in point of law [*143] the engineer had authority to bind the Company, but only left it to the jury to consider whether, in point of fact, the Company by their mode of dealing had authorized and sanctioned his acts. His Lordship intimated that he thought the evidence was strong to show that they had done so, but that it was for the jury to give the evidence its due weight. The objection of misdirection therefore fails.

Next we have to consider whether the plaintiffs were entitled to a verdict on the issue whether they were ready and willing to execute and perform the said contract according to the said conditions and stipulations, in manner and form &c.; and on the issue whether the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract. It is not denied that, if the defendants would have regularly accepted and paid for the chairs, the plaintiffs would have gone on regularly making and delivering them according to the contract: the objection is that, although the plaintiffs were desirous that the contract should be fully performed, yet, after receiving the notice that the Company did not wish to have any more chairs, and would not accept any more, they ceased to make any more, insomuch that the residue which the Company are alleged to have refused to accept never were made. The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract; that the defendants cannot be charged with a breach of it; that, after the notice from the defendants, which in truth amounted to a declaration that *they had broken and thenceforward renounced the [*144] contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them

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according to the pattern, with the name of the Company upon them, and to bring them to the appointed places of delivery and tender them to the defendants, who, from insolvency, had abandoned the completion of the line for which the chairs were intended, desiring that no more chairs might be made, and declaring, in effect, that no more should be accepted or paid for. We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labour, which might possibly enhance the amount of damages to be awarded against them.

Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "Make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them according to the
[*145] contract? But the learned counsel for the defendants *laid peculiar stress upon the words "nor did they prevent or discharge the plaintiffs from supplying the said residue" of the chairs "and from the further execution and performance of the said contract." We consider the material part of the allegation which the last plea traverses to be, that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that "prevent" here must mean an obstruction by physical force; and, in answer to a question from the COURT, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no

means of preventing an act from being done, except physical force or brute violence? Again, we are told there can be no "discharge" by a corporation unless by deed under the corporate seal. Of a discharge in one sense of the word this is true. A discharge is sometimes used as equivalent to a release, which must be under seal: *Brymer* v. *Thames Haven Dock and Railway Company* (1). But we conceive that, in the allegation traversed by the last plea, discharge only means, like prevent, that the act of the defendants was the cause *of the residue of the chairs not being delivered, and [*146] of the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs.

It is averred, however, that there are express authorities to show that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered; that to prevent must be by positive physical obstruction, and that there can be no discharging unless by instrument under seal. The first case relied upon was *West* v. *Blakeway* (2), in which, an action being brought by lessor against lessee on a covenant to yield up at the expiration of the term all erections and improvenents set up or made during the term, assigning for breach the removal of the sashes and framework of a greenhouse erected during the term, it was held to be a bad plea that there was a subsequent parol agreement between the parties that if the lessee would erect a greenhouse he should be at liberty to pull it down and remove it. But this merely illustrates the well known rule that a covenant under seal cannot be varied by parol: *Unumquodque ligamen dissolvitur eodem ligamine quo ligatur.* It has no application to a case where the covenantor is prevented from performing the covenant by the covenantee. In 1 Roll. Abr. 453, and in 5 Vin. Abr. 242, 243, tit. Condition (M. c.), will be found various instances of a covenant being discharged without deed by the act of the covenantee.

The next case relied on by the defendants' counsel was *Phillpotts* v. *Evans* (3). That was an action of *assumpsit for not accepting a [*147] quantity of wheat sold early in January, 1839, by the plaintiffs at Gloucester, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof." On the 26th of January the defendant gave notice to the plaintiffs that he would

(1) 2 Ex. 549.
(2) 58 R. R. 563 (2 Man. & G. 729).
(3) 52 R. R. 802 (5 M. & W. 475).

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not accept the wheat if it were delivered. It was then on its way by canal to Birmingham; and, on its arrival there, the defendant was required to accept it, but he refused to do so. The only question at the trial was as to the time with respect to which the damages were to be calculated. The market having continued to fall from the day of the contract till the bringing of the action, the defendant sought to take advantage of his own wrong, and to calculate the damages according to the price in the market on the 26th January when he gave notice that he intended to break the bargain; but it was very properly held that the plaintiffs were entitled to damages according to the market price when the wheat was tendered to the defendant for acceptance. The Court cannot be considered as having decided that, if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not at their pleasure have treated it as a breach of the contract and commenced an action against the defendant for not accepting it, without tendering it to him at Birmingham.

The most recent case cited by the defendants' counsel was *Ripley* v. *McClure* (1). This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory
[*148] contract, *whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But, in the case at Bar, the refusal never was retracted; and therefore there was a continuing breach down to the time when this action was commenced.

Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the

(1) 80 R. R. 593 (4 Ex. 345).

vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.

We are likewise of opinion that, in this case, the damages are not excessive, as the jury were justified *in taking into their calculation [*149] all the chairs which remained to be delivered, and which the defendants refused to accept. They were all included in the declaration and in the issues joined: the time mentioned in the proposal for the delivery of some of them had arrived before the notice was given; but the time of delivery was not of the essence of the contract; and the obligation was still incumbent upon the defendants to accept the whole of the residue.

The rule must therefore be discharged.

Rule discharged (1).

REG. *v.* GUARDIANS OF ST. MARTIN'S-IN-THE-FIELDS (2).

1851. *May* 29.

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(17 Q. B. 149—163; S. C. 20 L. J. Q. B. 423; 15 Jur. 800.)

Quo warranto lies for an office, though not immediately derived from the Crown, if it be so mediately (as where Commissioners are empowered by Act of Parliament to direct that such office be created); if it be an independent substantive office; and if it be of a public nature.

In a parish governed, as to the poor law, by guardians appointed under order of the Poor Law Commissioners, information in the nature of *quo warranto* lies for the office of clerk to the guardians, elected by the guardians under an order of the Commissioners, pursuant to the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 46, prescribing the duties; the tenure being for life and during sanity, or until resignation, or removal by the Commissioners: and the duties being: 1. To attend all meetings of the board of guardians and to keep their minutes. 2. To keep, check and examine all accounts, and other documents relating to the business of the guardians, and produce them to the auditor. 3. To peruse and conduct the correspondence of the guardians, and preserve the same, and all orders of the Commissioners, and make all necessary copies of letters &c. 4. To prepare all written contracts and agreements to be entered into with the guardians, and bonds &c. to be given by parish officers, and to see them duly executed. 5. To summon extraordinary meetings on requisition, and to issue all notices to the guardians. 6. To countersign all legal orders of the guardians on overseers for payment of money, and all legal orders of the guardians upon the treasurer. 7. To ascertain and enter the balance of

(1) See *Hochster* v. *De la Tour*, 2 E. & B. 678; *Roehm* v. *Horst* (1900) 178 U. S. 1.

(2) Cited, *R.* v. *Burrows* [1892] 1 Q. B. 399, 401, 61 L. J. Q. B. 88, 66 L. T. 25.

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account with the treasurer in the minute book before every ordinary meeting. 8. To lay the non-settled and non-resident poor accounts quarterly before the guardians, and to take their directions as to settlement of accounts with other parishes or unions. 9. To transmit periodical statements of relief had by non-settled poor to the parishes or unions on account of which it was given. 10. To communicate to the persons engaged in the relief of the poor within the parish all orders and directions of the Commissioners or guardians, give instructions for the prompt and correct execution of such orders, and report defaults. 11. To conduct all applications by the guardians to justices in Special, Petty or General Sessions, and, if an attorney, execute the legal business of the parish or guardians, with certain exceptions, making no charge except for disbursements. 12. To prepare and transmit all reports, answers or returns, required by the Commissioners, to questions relative to the administration of the poor law in the parish. 13. To conduct duly and impartially, and in strict conformity with the regulations in force at the time, the annual or any other election of guardians. 14. To observe and execute all lawful orders and directions of the guardians applicable to the office.

A RULE *nisi* was obtained last Term for a *mandamus* calling upon the above named guardians to elect a clerk.

[150] It appeared, on affidavit in support of the rule, that the administration of the poor laws in St. Martin's parish, and the government of the workhouse, were placed in the hands of twenty-four guardians by an order of the Poor Law Commissioners, under stat. 4 & 5 Will. IV. c. 76, dated 29th April, 1835. And that the Commissioners by a subsequent order (30th May, 1835), directed that the guardians should appoint a fit and proper person to be clerk to the board of guardians; also a treasurer and a relieving officer; and that, when any person so appointed should die or resign or be removed, the board of guardians should, as soon afterwards as conveniently might be, proceed in like manner to a new appointment; and that the salaries of such clerk, treasurer or relieving officers should be submitted to the Commissioners from time to time for their approval. By the same order it was directed that such clerk should (amongst other things) observe and fulfil all lawful orders and directions of the board of guardians, and likewise the rules, orders and regulations of the Commissioners. A clerk was accordingly elected (June, 1835); and his salary was fixed at 200*l.* a year. In a report, presented to the board, May 23rd, 1836, and adopted, his duties were described as follows. "The duties of this office shall be those laid down by the Poor Law Commissioners: also to assist the churchwardens and overseers in their duties: his attendance at the workhouse shall be from" &c. (fixing hours): the salary of 200*l.*

[*151] per annum, attached *to this office, to include all law charges except money out of pocket. The Commissioners (in July, 1836) approved

of the report, "and of the direction that the clerk should assist the churchwardens and overseers in their duties, so far as those duties related to matters connected with poor law administration."

The Commissioners, by a further order, of December 8th, 1847, addressed to the guardians of St. Martin's and seventeen other parishes, directed (Article 154) that the officers appointed to or holding certain offices enumerated in the order (1) included that of clerk, should respectively perform such duties as might be required of them by the rules and regulations of the Commissioners in force at the time, together with all such other duties, conformable with the nature of their respective offices, as the guardians might lawfully require them to perform. Also, (by Art. 186) that "Every officer appointed to or holding any office under this order, other than a medical officer, shall continue to hold the same until he die, or resign, or be removed by the Commissioners, or be proved to their satisfaction to be insane." And (by Art. 201) that

"The following shall be the duties of the clerk:

"No. 1. To attend all meetings of the board of guardians, and to keep punctually minutes of the proceedings at every meeting; to enter the said minutes in a book, and to submit the same so entered to the presiding chairman at the succeeding *meeting for his [*152] signature. No. 2. To keep, check and examine all accounts, books of accounts, minutes, books and other documents, as required of him by the regulations of the Commissioners, or relating to the business of the guardians; and from time to time to produce all such books and documents, together with the necessary vouchers, and the bonds of any officers, with any certificates relating thereto which may be in his custody, to the auditor of the parish, at the place of audit and at the time and in such manner as may be required by the regulations of the Commissioners. No. 3. To peruse and conduct the correspondence of the guardians according to their directions, and to preserve the same, as well as all orders of the Commissioners, and letters received, together with copies of all letters sent, and all letters, books, papers and documents belonging to the parish, or intrusted to him by the guardians, and to make all necessary copies thereof. No. 4. To prepare all written contracts

(1) They were as follows: Clerk to the guardians, treasurer of the parish, chaplain, medical officer for the workhouse, district medical officer, master of the workhouse, matron of the workhouse, schoolmaster, schoolmistress, porter, nurse, relieving officer, superintendent of out-door labour.

and agreements to be entered into by any parties with the guardians, and to see that the same are duly executed; and to prepare all bonds and other securities to be given by any of the officers of the parish, and to see that the same are duly executed by such officers and their sureties. No. 5. To receive all requisitions of guardians for extraordinary meetings, and to summon such meetings accordingly; and to make, sign and send all notices required to be given to the guardians, by this or any other order of the Commissioners. No. 6. To countersign all orders legally made by the guardians on overseers for the payment of money, and all orders legally drawn by the guardians upon the treasurer. No. 7. To ascertain, before [*153] every ordinary meeting of the board, *the balance due to or from the parish in account with the treasurer, and to enter the same in a minute book. No. 8. At the first meeting of the guardians in each quarter, to lay before the guardians, or some committee appointed by them, the non-settled poor account, and the non-resident poor account, posted in his ledger to the end of the preceding quarter, and to take the directions of the guardians respecting the remittance of cheques or post office orders to the guardians of any union, or other parish, or the transmission of accounts due from unions or other parishes, and requests for payments. No. 9. Within fourteen days from the close of each quarter, to transmit by post all accounts of relief administered in the course of the preceding quarter to non-settled poor to the guardians of the unions and other parishes on account of which such relief was given; and to state in every account so transmitted the names and classes of the several paupers to whom the relief in question has been administered. No. 10. To communicate to the several officers and persons, engaged in the administration of relief within the parish, all orders and directions of the Commissioners, or of the guardians, and, so far as may be, to give the instructions requisite for the prompt and correct execution of all such orders and directions, and to report to the guardians any neglect or failure therein which may come to his knowledge. No. 11. To conduct all applications by or on behalf of the guardians to any justice or justices at their Special, Petty or General Sessions, and, if he be an attorney or solicitor, to perform and execute all legal business connected with the parish, or in which the guardians [*154] shall be engaged, except prosecutions at the *Assizes, actions at law, suits in equity, or Parliamentary business, without charge for any thing beyond disbursements. No. 12. To prepare and transmit all reports, answers, or returns, as to any question or matter connected

with or relating to the administration of the laws for the relief of the poor in the parish, or to any other business of the parish, which are required by the regulations of the Commissioners, or which the Commissioners, or any Assistant Commissioner, may lawfully require from him. No. 13. To conduct duly and impartially, and in strict conformity with the regulations in force at the time, the annual or any other election of guardians. No. 14. To observe and execute all lawful orders and directions of the guardians applicable to his office."

On February 24th, 1851, the clerk to the guardians having resigned, a meeting of the board was held, at which Charles Robertson Griffiths was elected clerk, the offices of clerk and assistant having been consolidated by resolution of the board on a former day. The election was approved by the Poor Law Commissioners. Some of the guardians, however, objected that the resolution to consolidate had been irregularly passed; that Griffiths was not qualified for the office; and that the vote was not taken according to law: and on these grounds the election was impeached, and application made for a *mandamus*.

Sir F. Kelly and *Pashley* now showed cause.

(LORD CAMPBELL, Ch. J.: An answer to this motion seems to be that, according to *Darley* v. *The Queen* (1), a Quo Warranto information would lie for the office.)

The *House of Lords there consulted the Judges; and they were unanimously of question that a Quo Warranto information lies "for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others" (2). And the House held that such information lay for the office of treasurer of the county of the city of Dublin. The office here in question emanates from the Crown, not immediately, but through the Commissioners, acting under stat. 4 & 5 Will. IV. c. 76, s. 46. [*155]

(LORD CAMPBELL, Ch. J.: What is done by the donee of the power is supposed to be done by the donor.)

(1) 69 R. R. 121 (12 Cl. & Fin. 520). (2) 69 R. R. 121 (12 Cl. & Fin. 541, 542).

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The office is of a public nature, as appears by the enumeration of duties imposed by the Commissioners, whose order in this respect is equivalent to an express provision in the statute; and it is a substantive office.

(LORD CAMPBELL, Ch. J.: What is the tenure?)

It is held during life, and sanity, or until resignation or removal by the Commissioners.

(LORD CAMPBELL, Ch. J.: They may remove him at any time; but the appointment is equivalent to an appointment *quamdiu se bene gesserit.*)

In *Darley* v. *The Queen* (1) the Judges, when enquiring whether the office was public, noticed its functions as to the assessment, receipt and appropriation of moneys on the public account. The clerk here has similar functions as to pecuniary matters. If he misapplied moneys, he would be responsible as a public servant. His functions are recognized by stats. 5 & 6 Vict. c. 57, s. 17, and
[*156] 7 & 8 Vict. c. 101, s. 68. His admission, *on the subject of relief to a pauper, if not rebutted, binds a parish in the Union: *Reg.* v. *Wigan* (2).

(PATTESON, J.: In *Rex* v. *Hall* (3), which related to the office of register and clerk of the Court of Requests at Bristol, no question seems to have been raised as to the remedy by Quo Warranto until the taxation of costs, when the defendant was held not entitled to them under stat. 9 Ann. c. 20, s. 5.)

There have been conflicting decisions as to the remedy in cases of this kind: in a case cited in *Rex* v. *Beedle* (4) a Quo Warranto appears to have been granted for the office of guardian of the poor; and in the principal case that authority was acted upon. It was over-ruled in the subsequent case, *Re Aston Union* (5), but must be considered as re-established by *Darley* v. *The Queen* (6).

(COLERIDGE, J.: If Quo Warranto does not lie for the office of guardian it may yet lie for that of clerk.)

(1) 69 R. R. at p. 124 (12 Cl. & Fin. 542).
(2) 14 Q. B. 287.
(3) 25 R. R. 321 (1 B. & C. 123, 237).
(4) 42 R. R. 431 (3 Ad. & El. 467, 476).
(5) 6 Ad. & El. 784.
(6) 69 R. R. 121 (12 Cl. & Fin. 520).

Sir F. Thesiger and *Bramwell, contrà*, were then called upon by the COURT as to this point:

If the Court does not clearly see that this is an office for which Quo Warranto lies, a *mandamus* ought to be granted: *Rex* v. *The Rector &c. of Birmingham* (1).

(PATTESON, J.: There we proceeded on the ground that there was no other remedy, taking it for granted that Quo Warranto did not lie for the office of churchwarden.)

It is assumed here that the office is a public one, emanating from the Crown, because created under an Act of Parliament. But stat. 4 & 5 Will. IV. c. 76, s. 46, only enables the Commissioners "as and when they shall see fit" to direct the overseers *or guardians [*157] "to appoint such paid officers" "as the said Commissioners shall think necessary," for carrying the Act into execution. That is not a direct creation of the office. No such office as that of clerk to the guardians might ever have been created. And, if the argument could prevail, Quo Warranto would lie for every office with pay which the guardians might institute under order of the Commissioners: for example, that of master of the workhouse, which in fact is one of those mentioned in the order of 1847.

(PATTESON, J.: Have you authority for saying that Quo Warranto would not lie for that office?)

It is not of a public nature; nor is that of clerk. If this were within the rule laid down in *Darley* v. *The Queen* (2), the offices of nurse and matron would be so.

(LORD CAMPBELL, Ch. J.: It may be said that the duties of such offices are menial, and not public. The office in question is very different in its functions. It is more like that of a treasurer.)

The clerk is but servant to the guardians in respect of a particular class of duties. As to the employment being public, a parish is not in all its transactions a public body, as appears from *Rex* v. *Edmonton* (3). The functions of the guardians themselves are as public and important as those of their clerk; yet Quo Warranto does not lie for the office of guardian: *Re Aston Union* (4), *Rex* v. *Ramsden* (5).

(1) 45 R. R. 717 (7 Ad. & El. 254).
(2) 69 R. R. 121 (12 Cl. & Fin. 520).
(3) 1 Moo. & Rob. 24.
(4) 6 Ad. & El. 784.
(5) 42 R. R. 431 (3 Ad. & El. 456).

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(COLERIDGE, J.: The guardians are elected by the ratepayers.

PATTESON, J.: It is suggested by TINDAL, Ch. J., in *Darley* v. *The Queen* (1), that in the cases of overseers, and in others analogous to them, Quo Warranto may have been deemed not to lie because the offices were temporary; but I can say that this [*158] *was not our ground of decision in the cases last cited. The office of a mayor is temporary. It certainly was my opinion, and that of Lord TENTERDEN and Mr. Justice TAUNTON, and we uniformly acted upon it, that Quo Warranto was not the remedy unless there were an usurpation actually upon the Crown. That, however, seems over-ruled by *Darley* v. *The Queen* (1).)

It is now decided that the remedy extends to offices of a public nature.

(LORD CAMPBELL, Ch. J.: Unfortunately the line of demarcation there is more doubtful.)

It is very difficult to define what is an office of a public nature.

(LORD CAMPBELL, Ch. J.: Whether it was on behalf of one parish or several united, would not, I should think, make any difference.)

The office may be deemed public if connected with the administration of justice.

(PATTESON, J.: That might be a ground of distinction in *Rex* v. *Hall* (2).)

The same remark may apply to some offices in the new county courts. Quo Warranto does not lie for the office of churchwarden: *Rex* v. *Dawbeny* (3); nor for that of clerk to Commissioners of Land Tax: *Rex* v. *Thatcher* (4); though they are appointed under a statute, and their clerk has public duties.

(COLERIDGE, J. mentioned *Rex* v. *Badcock* (5).)

(1) 69 R. R. 121 (12 Cl. & Fin. 520).
(2) 25 R. R. 321 (1 B. & C. 123, 237).
(3) 2 Stra. 1196; *S. C.*, more fully, 1 Bott. P. L. 347, pl. 358, 6th ed., where it is said: "But the COURT denied the motion" (for Quo Warranto) "a churchwarden not being such a public officer against whom an information would lie; for it was no usurpation upon the Crown, and they might as well apply for an information against a constable or overseer."
(4) 1 Dowl. & Ry. 426.
(5) Cited in *Rex* v. *The Corporation of Bedford Level*, 6 East, 359.

It is clear from *Darley* v. *The Queen* (1) that an office, to be the subject of Quo Warranto, must be of a substantive and independent character: here, if no clerk were appointed, the functions *of that office must be performed by the guardians themselves. He is only their assistant. [*159]

(LORD CAMPBELL, Ch. J.: Does not he countersign documents?)

If there be such an officer appointed, he does. The officers mentioned in the order of December, 1847, need not all separately exist: two offices may be consolidated. The duties of the clerk are different according as he is or is not an attorney. In *Darley* v. *The Queen* (1) the office was substantive and independent; here it is neither. If this question be a doubtful one, it may be fitly argued on demurrer to a return.

LORD CAMPBELL, Ch. J.:

This rule must be discharged, because *mandamus* is not the proper course of proceeding. A person, other than the prosecutor, has been elected; the office is full; therefore, according to the established and convenient rule, if Quo Warranto lies, the proceeding ought to be in that form. Then, does Quo Warranto lie for the office of clerk to the guardians? If this question had arisen before the decision in *Darley* v. *The Queen* (1), I should have been perplexed by the contrariety of opinions in former cases: but that lays down that the writ lies if the office be a substantive one and of a public nature, held under a statute, though the assumption of it be not otherwise an usurpation upon the Crown. It was formerly held in this Court that, unless there was a direct usurpation upon the Crown, a Quo Warranto, or an information in the nature of it, would not lie; but *Darley* v. *The Queen* (1) alters that doctrine. Here the office is held as under a statute, the Commissioners being empowered by statute to order its creation: *it has express duties prescribed; and the tenure is during good behaviour; for, although, under the Commissioners' order of December, 1847, the officer is to hold only until he "be removed, the removal must be on some grounds. Then, is the office of a public nature? We must look to the functions, and compare them with those which were held to constitute such an office in *Darley* v. *The Queen* (1). The House of Lords laid down no criterion in that [*160]

(1) 69 R. R. 121 (12 Cl. & Fin. 520).

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case; but they held that the office there in question was public within the rule they laid down: and I think the present office is not distinguishable. Whether the district for which it is exercised be a parish, or a hundred, or several parishes in a union, appears to me to form no ground of distinction, if it be an office in which the public have an interest. I do not regret coming to this decision, because the rights may be tried more easily and directly by means of an information than if a *mandamus* were granted.

PATTESON, J.:

Before the case of *Darley* v. *The Queen* (1) I thought, and Lord TENTERDEN and Mr. Justice TAUNTON were strongly of the same opinion, that the remedy by Quo Warranto was limited to the case where there was an usurpation simply upon the Crown: my brother PARKE differed (2); and so did Lord DENMAN (3), though on a subsequent occasion (4) he gave way to the authorities against granting the writ. And there had been instances in which the writ had been granted against persons acting as Commissioners under statutes. *But in *Darley* v. *The Queen* (1) I was satisfied upon the point, and agreed with the other Judges. Our opinion then was that, whenever an office is created mediately or immediately by the Crown, and is public, a Quo Warranto lies. How far that shakes the decisions in *Re Aston Union* (4) and other cases cited by the Judges, I need not say; certainly it does shake them. Then, does this office come within the rule laid down? It is argued that, the Queen being party to the Act of Parliament by which it is created, the usurpation of it is an usurpation upon her. And I think the office is created by the Crown, not immediately, but mediately through the Act 4 & 5 Will. IV. c. 76, which, by sect. 46, entrusts to the Commissioners the power of causing paid officers to be appointed, with very stringent directions as to the duties to be required. If, in the present case, the officer had been, as was suggested, a mere servant, the office would not have been, within the rule laid down, an independent substantive office. But, although several of the duties are such as would be performed by the guardians themselves if there were no clerk, some are independent: and, the officer being appointed by the guardians under an order of the Commissioners, which they could not give but for the

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(1) 69 R. R. 121 (12 Cl. & Fin. 520).

(2) *Rex* v. *Ramsden*, 42 R. R. 437 (3 Ad. & El. 456, 464); *Rex* v. *Hanley*, 42 R. R. 431 (3 Ad. & El. 463, note (*b*)).

(3) *Rex* v. *Beedle*, 42 R. R. 437 (3 Ad. & El. 467).

(4) *Re Aston Union*, 6 Ad. & El. 784.

statute, I think the office is, so far, within the rule in *Darley* v. *The Queen* (1). Then, is it a public office? We are told that, if it were so, that of master of the workhouse would be so too. But we need not enquire further than into the case before us. For some purposes it seems that a parish is not so far a public body as to have the exemptions which such a body might claim: *Governors of the *Bristol Poor* v. *Wait* (2). But the question here is not [*162] whether the body for which the officer acts is public; it is whether his duties are of a public nature: and, as the exercise of them materially affects a great body of persons, I think they are so. Therefore, according to *Darley* v. *The Queen* (1), Quo Warranto lies, and consequently a *mandamus* ought not to be granted.

COLERIDGE, J.:

The decision in *Darley* v. *The Queen* (1) not only broke down the previously conceived opinion (though different ones had prevailed), but established a rule, which is difficult of application. We must however apply it as we can to each case that comes before us. I had some doubt here; but I think the question may be satisfactorily answered under the two or three heads to which it reduces itself. First, the nature of the office, and secondly its tenure, brings it within the rule: the clerk is removeable by the Commissioners; but that must be on cause shown. Thirdly, as to the duties, it is difficult to define what are of a public nature: but the clerk here is, among other things, to communicate to the persons engaged in the relief of the poor throughout the parish all orders and directions of the Commissioners and guardians, and to give instructions for the execution; to conduct the elections of guardians; to be the channel of communication between the board and parish officers and the Commissioners upon questions which may arise respecting the administration of the poor law or other parochial business; and to manage the communications also between his board and all other poor law boards or *parochial bodies through- [*163] out the kingdom. Therefore, without going farther, or deciding anything as to other cases, which must be taken as they arise, I entirely agree that, in this instance, the remedy by Quo Warranto applies.

ERLE, J.:

Three tests of the applicability of a Quo Warranto are given by

(1) 69 R. R. 121 (12 Cl. & Fin. 520). (2) 44 R. R. 370 (5 Ad. & El. 1).

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Darley v. *The Queen* (1): the source of the office, the tenure, and the duties. The source here is a statute; the tenure, secure enough to satisfy the rule: as to the duties, no definition of public duties has been given; all we can do is to follow such guidance as we have from the last cited case. If the execution of an office secures the proper distribution of a fund in which a body of the public (the contributors to a parish rate) have an interest, the office may be deemed public. I think the clerk's duties here are so, not only on the grounds which have been stated, but inasmuch as he has the countersigning of cheques, a function which, if duly discharged, secures the ratepayers generally, and the neglect of which may prejudice them. I think no distinction arises from the parish being part of a union.

LORD CAMPBELL, Ch. J.:

I do not by any means say that *Darley* v. *The Queen* (1) applies to all the offices mentioned in the order of December, 1847 (as, for instance, to that of a nurse, which is menial); though it may be difficult to say where we should draw the line.

Rule discharged (2).

1851.
June 16.

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REG. *v.* GRIFFITHS.

(17 Q. B. 164—166.)

By an order of the Poor Law Commissioners regulating the proceedings of guardians of the poor in the parish of M., the election of officers was to be by a majority of the guardians present at a meeting of the board. By the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 19, in case of an equality of votes upon any question at a meeting of guardians of any union or parish, the chairman has a "second or casting vote."

At an election of clerk to the guardians of M. twenty-two guardians attended. On their assembling, the chairman said he should not vote for any candidate, but merely preside at the meeting as chairman. He did so, and took the votes, of which there were eleven for one candidate and ten for another. The former was declared elected, and entered upon the office. On motion for a Quo Warranto:

Held that the chairman could not be considered as having, for the purpose of the election, withdrawn; and that such election was void, as not having been determined by a majority of the guardians present.

AFTER the decision in the last case, *Sir F. Thesiger* obtained a rule *nisi* for a Quo Warranto information against Griffiths for exercising the office of clerk to the guardians.

(1) 69 R. R. 121 (12 Cl. & Fin. 520).

(2) See the next case.

It appeared on affidavit that the 38th article of the order of the Poor Law Commissioners (referred to in the last case) dated 8th December, 1847, was as follows: "Every question at any meeting consisting of more than three guardians shall be determined by a majority of the votes of the guardians present thereat, and voting on the question; and, when there shall be an equal number of votes on any question, such question shall be deemed to have been lost." And that Article 155 was: "Every officer and assistant to be appointed under this order shall be appointed by a majority of the guardians present at a meeting of the board, consisting of more than three guardians, or by three guardians if no more be present." The election of Griffiths took place at a meeting of twenty-two guardians. The chairman of the guardians informed them, as soon as they were assembled, that he intended not to vote for *any one of the candidates (there being four), and [*165] should merely preside at the meeting as chairman. He did so, and took the votes (1). There were eleven for Griffiths, ten for another candidate, and none for either of the remaining two. Griffiths was declared to be elected, and afterwards entered upon the office.

Sir F. Kelly, with whom was *Pashley*, now showed cause:

It will be objected that Griffiths was not elected, according to Article 155, by a majority of the guardians present, the chairman having legally a vote, and not having given it. If the Court is of that opinion, it will be useless to go farther. But a question may be, whether the chairman, after his declaration that he did not intend to vote, was not virtually absent for the purpose of the election.

(LORD CAMPBELL, Ch. J.: There might perhaps have been a withdrawing of the chairman, like the Lord Chancellor going behind the woolsack, or the Speaker behind the chair: but if he actually continued present, the case is different.)

Sir F. Thesiger, contrà, referred to stat. 12 & 13 Vict. c. 103, s. 19, which enacts: "That in the case of an equality of votes upon any question at a meeting of the guardians of any union or parish the presiding chairman at such meeting shall have a second or casting vote."

(1) There was an objection to the manner of taking the votes, which the result of the present case makes it unnecessary to state.

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LORD CAMPBELL, Ch. J.:

We all think that in this *case the chairman was a guardian present; and therefore the eleven did not constitute a majority.

PATTESON, COLERIDGE and ERLE, JJ. concurred.

The rule was made absolute; it being understood that no information should issue, and that Griffiths would resign within a week, performing the duties of clerk only until a new election.

1851. *April* 15, 16. *May* 10, 28.

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IN RE WADSWORTH AND THE QUEEN OF SPAIN (1). IN RE DE HABER AND THE QUEEN OF PORTUGAL (1).

(17 Q. B. 171—220; S. C. 20 L. J. Q. B. 488; 16 Jur. 164.)

Property in England, belonging to a foreign sovereign Prince in his public capacity, cannot be seized under process in a suit instituted against him in this country on a cause of action arising here.

And, therefore, where a suit had been brought in the Lord Mayor's Court against the Queen of Spain upon bonds of the Spanish Government bearing interest payable in London, and moneys, belonging to her as the Sovereign of that country, had been attached in the hands of garnishees in London to compel her appearance, the Court of Queen's Bench granted a prohibition.

Although the action was not, in form, brought against the Queen as Sovereign: it appearing sufficiently by the proceedings that she was charged with liability in that character.

The same law prevails, *à fortiori*, where the action is avowedly grounded on acts done by the defendant in the character of Sovereign.

The garnishee, in such a case, is a proper party to move for the prohibition.

And it is no objection, that he has put in a plea (*Nil habet*) to the attachment.

Nor is the motion premature, if made after the pleading of such plea and before trial of the issue, though no other excess of jurisdiction is imputed to the Lord Mayor's Court than its having entertained the suit.

The motion may also be made by the sovereign Prince who is defendant in the Mayor's Court, though the defendant has not appeared, and the garnishee has not pleaded.

The prohibition may go at the instance of a mere stranger.

IN the first of these cases, *Chambers*, on behalf of the aftermentioned garnishees, moved, in last Easter Term (April 15th), that a prohibition might issue to the Lord Mayor's Court of

(1) Cited, *Frith* v. *Guppy* (1866) L. R. 2 C. P. 36, 36 L. J. C. P. 45; *Mayor of London* v. *Cox* (1867) L. R. 2 H. L. 239, 270, 291, 36 L. J. Ex. 225; *Larivière* v. *Morgan* (1872) L. R. 7 Ch. 554, 41 L. J. Ch. 750; *The Charkieh* (1873) L. R. 4 A. & E. 94, 42 L. J. Adm. 17; *Worthington* v. *Jefferies* (1875) L. R. 10 C. P. 383, 44 L. J. C. P. 209; *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149, 163, 63 L. J. Q. B. 593, 70 L. T. 64, C.A.—A. C.

London, under circumstances disclosed in an affidavit sworn by Henry Treasure, clerk to Messrs. Lawford, attorneys, and Joaquin Scheidnagel and George Stone, garnishees in the suit *Wadsworth* v. *The Queen of Spain*, depending in the said Court.

H. Treasure deposed: That he hath the conduct and management of a certain cause now pending in the Court of the Lord Mayor of the city of London, wherein one Thomas Page Wadsworth is the plaintiff, and her Catholic Majesty Doña Isabel Segunda, Queen of Spain *(in the said cause described as her Most Christian [*172] Majesty Doña Isabel Segundar Queen of Spain) is defendant, and wherein the above-named deponent Joaquin Scheidnagel, is garnishee, and also the above-named deponent George Stone, together with John Martin, James Martin and Robert Martin, are garnishees, in two certain attachments issuing out of the said Court. That the cause of action, as appears by an affidavit filed in the said Court by T. P. Wadsworth on 30th December, 1850, is for 10,000*l.* sterling for interest alleged to be due to him from her said Catholic Majesty upon certain bonds or certificates dated respectively the 10th December, 1834, and stated by Wadsworth to have been duly made and entered into by or on behalf of her Majesty the then Queen Regent of Spain, in the name of her august daughter the said Donna (1) Isabel &c. the defendant, by virtue of the law decreed by the Cortes and sanctioned by her said Majesty the said Queen Regent in the name of her said daughter the Queen of Spain, on 16th November, 1834; and of the alleged treaty between the Minister, Secretary of State for the Finance Department of Spain, and Mons. Ardoin, banker, of Paris, on 6th December, 1834.

The deponent George Stone stated that, on 30th December, 1850, he and his partners, John Martin, James Martin and Robert Martin, who, with deponent, carry on business as bankers in the city of London, were served with the following document, addressed to them and dated December 30th, 1850:

"Take notice that, by virtue of an action entered in the Lord Mayor's Court, London, against her Most Christian Majesty Doña Isabel Segundar Queen of *Spain, defendant, at the suit of Thomas [*173] Page Wadsworth, plaintiff, in a plea of debt upon demand of 20,000*l.*, I do attach all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the

(1) *Sic.*

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plea aforesaid: and that you are not to part with such moneys, goods or effects without license of the said Court.

"CHAS. SEWELL, Serjeant-at-Mace.

"GEO. ASHLEY, plaintiff's attorney, Lord Mayor's Court Office, Old Jewry."

Scheidnagel deposed that, on the same 30th December, he was served with a document, addressed to him, but in all other respects the same as that above set forth. That he is president of a Commission called the Spanish Financial Commission, which was appointed in 1834 by the Government of the kingdom of Spain for the management in England of the affairs relative to the public debt of the said kingdom, and for facilitating the payment of interest or dividends payable on account of the said kingdom to the holders in England of certain bonds or certificates, and of other public securities issued by or on behalf of the said kingdom; and that, as the president of the said Commission, he hath, for the purpose of paying in England the coupons or half-yearly dividends of the said bonds or certificates, from time to time received from the Director-General of the said kingdom of Spain, one of the Ministers of the said Queen of Spain, divers large remittances; and that the same have accordingly from time to time been applied to the purposes of such payments as and when the holders of the
[*174] said bonds have presented to the said *Commission the said coupons; but that the holders of a large number thereof had not, at the time of the service of the said two attachments, presented such coupons, or in any other manner applied for payment of the dividends or interest in respect thereof; and the residue of the said moneys, amounting to 7,456*l.* 19*s.* 6*d.* or thereabouts, so remitted as aforesaid, and applicable to the payment of the same, have therefore remained under the control of the said Commission, awaiting the presentation of the said coupons, and, at the time of the service of the attachment, were in the hands of the said Jo. Martin, G. Stone, Jas. Martin and R. Martin, as the bankers of the said Financial Commission: And that, some time previous to the days appointed for the payment of such respective half-yearly dividends or coupons, and subsequent to the receipt of the remittances for such respective payments, the said Financial Commission, in conformity with the directions given by the said Director-General of the said kingdom of Spain, caused advertisements to be from time to time inserted in the English newspapers, naming the day on

which such respective payments would be made of the interest due upon the said bonds: And that deponent had not, at the time of the service of the said attachments respectively, nor, as he verily believes, had the said Jo. Martin, G. Stone, Jas. Martin and R. Martin, or either of them, in their possession or power any moneys, goods and effects of the said Queen of Spain as her private property and unconnected with the Government of her said kingdom: And that her said Catholic Majesty Doña Isabel was, at the time of the commencement of the said action, and now is, the reigning Sovereign of the kingdom of Spain, *and as such entitled to, and [*175] then enjoyed and is now enjoying, all the rights, prerogatives and privileges appertaining to such sovereignty: And that the said bonds or certificates were made by the said then Queen Regent of Spain as aforesaid in her sovereign character only, and for and solely on account of the said kingdom of Spain, and as an act of State in the government thereof, and not for or in respect of any private or personal debt owing by the said Queen Regent, or by her said Catholic Majesty Doña Isabel, to the said T. P. Wadsworth: And that her said Catholic Majesty was, at the time of the commencement of the said action, and now is, resident and domiciled within the kingdom of Spain and out of the jurisdiction of this honourable Court, owing no allegiance at any time to the sovereign lady Queen Victoria; and that her said Catholic Majesty Doña Isabel is recognized and acknowledged by the said sovereign lady Queen Victoria as the now reigning Sovereign of the kingdom of Spain; and that the said last mentioned kingdom is at amity with the Crown of Great Britain and Ireland.

The deponent H. Treasure further stated that the action in the Lord Mayor's Court was commenced on 30th December, 1850; that Scheidnagel pleaded to the attachment *Nil habet*, and the defendants Martins and Stone *Nil habent;* but the issues had not yet been tried; though deponent believed that Wadsworth intended proceeding to trial of the attachments as soon as the practice of the Lord Mayor's Court would allow, and, in the event of his obtaining a verdict, would sue out execution to recover the moneys in the hands of the garnishees Martins and Stone, unless prohibited by this *Court. He further deposed: That he hath been advised and [*176] verily believes that, in the event of the said T. P. Wadsworth proving upon the trials of the said attachments that the said garnishees respectively have moneys in their hands as aforesaid, he will be immediately afterwards entitled to sue out process to

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levy and take into execution the amount so proved to be in the hands of the garnishees respectively, unless special bail be given for her said Catholic Majesty for the amount sought to be recovered by the said T. P. W.: That, on 29th January last, application was made by counsel to the Recorder of the Lord Mayor's Court to dissolve the said attachments on common bail being filed on behalf of the Queen of Spain, on the ground that a foreign independent Sovereign could not be held to bail: but the Recorder refused to dissolve the attachments; and the same now remain in full force: And deponent hath been advised, and verily believes, that, by the laws and customs of the city of London, no plea upon the trial of the said attachments can be entered on the part of her said Catholic Majesty the Queen of Spain, or demurrer or other proceeding tendered or put in by the garnishees, whereby the question of jurisdiction of the said Lord Mayor's Court to call upon her said Catholic Majesty to answer the matters complained of by the said T. P. W. can be raised, or the power of the said Lord Mayor's Court to attach the said money of her said Catholic Majesty questioned, nor can any steps be taken in the said Lord Mayor's Court, whereby the question of her said Catholic Majesty's liability in respect of the alleged causes of action of the said T. P. W. can be decided, unless special bail shall have been first given on behalf of her said Catholic Majesty.

[177] The affidavit of H. Treasure verified a copy of Wadsworth's affidavit of debt in the cause, and copies of the record and proceedings in the attachments, and of one of the bonds or certificates referred to in Wadsworth's affidavit. The bond or certificate was headed (so far as the terms are material):

"Public Debt of Spain.

"Great Book of the active debt.	Five per cent. Consols."

A translation of the body of the instrument was annexed to the copy, and was as follows:

"The bearer of this certificate is entitled to an annuity of ten hard dollars, equivalent to fifty-four francs or two pounds two shillings and six pence sterling, representing a capital of two hundred hard dollars, one thousand and eighty francs, or forty-two pounds ten shillings sterling, by virtue of the law decreed by the Cortes and sanctioned by her Majesty the Queen Regent in the name of her august daughter Doña Isabel II., the 16th November,

1834, and of the treaty concluded between the Minister Secretary of State for the Finance Department, and M. Ardoin, banker, of Paris, the 6th December of the same year.

"The said annuity will be payable in Madrid, Paris or London at the option of the bearer, half yearly, on the 1st May and 1st November in each year, on presentation of the dividend warrant then due: in Paris at the rate of five francs forty centimes per hard dollar, and in London at four shillings and three pence sterling, also per hard dollar.

"The bearer has the option of causing this certificate *to be [*178] definitively converted into an extract of inscription, payable in Madrid.

"To this certificate are attached forty dividend warrants. If at the end of twenty years it should not have been withdrawn from circulation either by means of redemption or of conversion into an extract of inscription, forty new dividend warrants shall be delivered on the presentation of this certificate with the dividend warrant preceding that which latest becomes due."

The instrument was dated "MADRID, 10 December, 1834," and purported to be subscribed by the Secretary of State for Foreign Affairs, the Count Toreno, and by the Director of the Royal Sinking Fund ("El Director de la Real Caja de Amortizacion") and of the Great Book, Antº. Barata.

The affidavit of debt was as follows.

"In the Mayor's Court, London.

"Thomas Page Wadsworth, of No. 11, Down Street, Piccadilly" &c., "maketh oath and saith: That her Most Christian Majesty Doña Isabel Segundar, Queen of Spain, is justly and truly indebted unto this deponent in the sum of 10,000*l.* sterling and upwards for interest upon and by virtue of certain bonds or certificates, bearing date respectively the 10th day of December, 1834, and duly made" &c. (describing them as at p. 399, *ante*): "And which said interest was due and payable on certain days now past.

"Sworn at the Lord Mayor's Court Office, London, this 30th day of December, 1850. Before me, G. ASHLEY." "T. P. WADSWORTH.

The subsequent proceedings were: The declaration in the Lord [179] Mayor's Court, whereby the plaintiff "demands against her Most Christian Majesty Doña Isabel Segundar, Queen of Spain, 20,000*l.*

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of lawful money of Great Britain which she owes to and unjustly detains from the said plaintiff. For that, whereas the said defendant, on" &c., "at the parish of Saint Helen, London, and within the jurisdiction of this Court, for and in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff at the parish aforesaid and within the jurisdiction aforesaid, and then being in arrear and unpaid, granted and agreed to pay to the said plaintiff the said sum of 20,000*l.* above demanded where and when she the said defendant should be thereunto afterwards required: Yet, notwithstanding, the said defendant, although often thereto requested, hath not yet paid to the said plaintiff the said sum of 20,000*l.* above demanded, or any part thereof. To the damage" &c.

Then followed prayer of process by the plaintiff; award of summons calling on defendant to appear and answer; return to the Court that defendant had nothing within the city or liberties whereby she could be summoned, nor was to be found within the same; non-appearance and default by defendant on being called at the same Court: allegation by plaintiff at the same Court that Scheidnagel owes defendant 10,000*l.* in moneys numbered, "as the proper moneys of the said defendant," and now has and detains the same in his hands and custody; prayer of process by plaintiff, to attach &c.; whereupon the Serjeant-at-Mace was commanded by the COURT that he, according to the custom &c., attach the said [*180] defendant by the said 10,000*l.* so *being in the hands and custody of the said garnishee as aforesaid, and the same in his hands and custody defend and keep, so that the said defendant may appear in this Court here to be holden &c. to answer the said plaintiff in the plea aforesaid; and that the said Serjeant-at-Mace return &c.: appearance by plaintiff at a Court holden 13th January, 1851, and return by the Serjeant that he had attached defendant by the said 10,000*l.* so being in the hands and custody of the said garnishee, and the same defended &c. according to the custom &c., so that defendant might appear at this Court to answer in the said plea: And that defendant thereupon was solemnly called at the same Court and did not appear, but made a first default, which was recorded, and a further day given to defendant to appear at the next Court, to be holden &c.: similar defaults by defendant at three other Courts, plaintiff appearing: prayer of process by plaintiff, at the fourth Court, against the garnishee, and order by the COURT, thereupon, that the Serjeant warn the garnishee to appear on 17th January to

show cause why plaintiff ought not to have execution of the 10,000*l.* attached in garnishee's hands: appearance on the day named, and imparlance, by the garnishee, who, on a subsequent day, pleaded:

That, at the time of making the said attachment, or at any time since, he had not owed to or detained from, or yet has, owes to or detains from, the said defendant named in the bill original and attachment aforesaid the said 10,000*l.* or any part thereof, in manner and form &c.; concluding to the country.

Then followed a bill of proof by Thomas Paterson of Liverpool, merchant, praying to be admitted to prove that the 10,000*l.* is his property; and probation by the *same party, alleging that he [*181] claimed interest in the 10,000*l.* (parcel of the said 20,000*l.*), for that the same was received by the garnishee, and held by him, for and on account of the defendant; and that, while the same was so held by the garnishee, a negotiation was pending between the approver and defendant for the supplying to defendant by the approver of certain large quantities of corn, to wit forty ship loads: that, ultimately and before the said attachment, a contract was made and entered into by and between the approver and defendant; and, by the terms of such contract, the approver was to supply forty ship loads of corn to the defendant at the times and periods mentioned in such contract: That, on such contract being made, the approver required a sum of money from defendant on account of such shipments, to wit 10,000*l.*: That defendant agreed to pay the said sum of money, and arranged that the same should be paid to the approver by remitting the same to Joaquin Scheidnagel the defendant's agent in London, being the garnishee in the said attachment, and then, at the time of the making the said contract and before the making the said attachment, gave the said approver an order to receive the said 10,000*l.* when paid to defendant's said agent in London, so being the garnishee as aforesaid, for the specific purpose of paying the same to the approver; which order is dated long before the issuing the said attachment, to wit on 2nd November, 1850: And that the said sum was so placed in the hands of the garnishee by defendant for the specific purpose of applying the same to the order above mentioned: Wherefore the approver claimed the said 10,000*l.*, and he offered to verify the premises, and that the 10,000*l.* was his property, in manner &c., as he had claimed: and *he prayed to be admitted to prove the same, [*182] according to the custom of the city.

There were also proceedings (similar to the earlier ones in the

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case of Scheidnagel) resulting in the attachment of 10,000*l.* in the hands of Martins and Stone; warning to them to show cause &c.; plea by them that, at or since the time of the attachment, they had not owed to or detained from defendant the said 10,000*l.* or any part thereof, in manner &c., concluding to the country: bill of proof and probation by the said Thomas Paterson, alleging facts as stated on the probation in Scheidnagel's case, as to the contract for corn, and demand by Paterson of 10,000*l.* on account: And that the said defendant agreed to pay the said sum of money last mentioned, and arranged that the same should be paid to the approver by remitting the said sum of 10,000*l.* to one Joaquin Scheidnagel, the defendant's agent in London, with directions to the said J. Scheidnagel to place the said sum in the hands of the garnishees named in the present attachment, to meet the payment of the order after mentioned, and then, at the time of making the aforesaid contract, and before the making of the said attachment, gave the said approver an order to receive the said 10,000*l.* when paid into the hands of the garnishees as aforesaid for the specific purpose of paying the same to the approver; which said order is dated long before the issuing of the said attachment, to wit on 2nd November, 1850: That the said sum was so placed in the hands of the said garnishees by defendant through her agent for the specific purpose of applying the same to the payment of the order above mentioned: Wherefore the said approver claimed &c.; as before.

[183] *Chambers*, in moving, cited *The Duke of Brunswick* v. *The King of Hanover* (1), and contended that the sovereign Prince of a foreign realm could not be sued in an action which required that she should put in special bail to answer in a Court of this country for an act of State: and, consequently, that proceedings could not go on against the garnishees.

(LORD CAMPBELL, Ch. J.: Must there be an affidavit of debt, to commence a suit in the Lord Mayor's Court?)

Randell (with *Chambers*):

There must, by the custom.

A rule *nisi* was granted. In last Easter Term (2),

(1) In the Rolls Court, 63 R. R. 1 (6 Beav. 1); *Same* v. *Same* in Dom. Proc. (decree of Rolls Court affirmed), 81 R. R. 1 (2 H. L. C. 1).

(2) May 10th. Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

Hoggins, *Welsby* and *Locke* showed cause (1):

The affidavits in support of the rule show a case within the jurisdiction of the Lord Mayor's Court. No objection can be founded on the affidavit of debt, which is unnecessary, and no part of the proceedings in the Court. (On this point *Banks* v. *Self* (2) and *Hatton* v. *Isemonger* (3) were cited.)

(LORD CAMPBELL, Ch. J.: The affidavit is intended to show the cause of action. It seems to be evidence against the plaintiff, as far as it goes (4).)

The proceeding in question is against a garnishee according to the custom of foreign attachment. Assuming that in some stage of the case the Queen might interpose, and allege something to defeat the action, a prohibition cannot go. The Lord Mayor's *is the [*184] only Court which has jurisdiction in this kind of proceeding; and, if a prohibition lay under the present circumstances, the party complaining would have no remedy: for which reason privilege, of attorneys or others, is not allowed to oust the Court of jurisdiction in foreign attachment: *Turbill's* case (5), Gilb. Com. Pleas, 209, *Ridge* v. *Hardcastle* (6). The practice is fully set out in Bohun's Privilegia Londini, 253 *et seq.*, 3rd ed. It is enough, for the purpose of instituting a foreign attachment, to show that the garnishee, being within the city, has funds of the defendant; and, if the garnishee does not come in and establish anything that may discharge him, which the defendant also is at liberty to do, then, according to the certificate of the Recorder of London, cited in note (1) to *Turbill's* case (5), "judgment shall be, that the plaintiff shall have judgment against him" (the garnishee), "and that he shall be quit against the other, after execution sued out by the plaintiff."

(LORD CAMPBELL, Ch. J.: The garnishee's payment is taken to be a payment by the defendant.

PATTESON, J.: Surely the foundation of all this proceeding is a debt as to which the Court has jurisdiction over the defendant. As you argue, if there were funds in the city belonging to the

(1) *Gurney* attended on behalf of the city of London to watch the proceedings, lest the custom of foreign attachment should be infringed upon.
(2) 5 Taunt. 234, *n.*
(3) 1 Stra. 641.
(4) See p. 418, *post*.
(5) 1 Wms. Saund. 67.
(6) 8 T. R. 417.

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Queen of England, there might be an attachment against the garnishee.)

In *Banks* v. *Self* (1), cited and acted upon in *Harington* v. *Macmorris* (2), the defendant pleaded a recovery against him as garnishee in a suit against the plaintiff, defendant being debtor to plaintiff at the time: and on demurrer it was objected that the suit against the now plaintiff in the Court below was not shown to [*185] *have been brought for a debt arising within the jurisdiction: but the Court of Common Pleas held this no valid objection, and gave judgment for the defendant.

(LORD CAMPBELL, Ch. J.: The question there was, whether it must positively appear on the pleadings that the Court had jurisdiction: it was not said that the want of jurisdiction, if averred, might not have been an answer.

ERLE, J.: The decision is only that things done before a competent tribunal are presumed to be rightly done.)

In *Self* v. *Kennicot* (3) the defendant pleaded to debt on bond "that the plaintiff being indebted to J. S. he made an attachment of the said money in his hands;" on demurrer, one objection was, that "it does not appear that the debt arose within the jurisdiction;" and it seems that the plea was held good.

(LORD CAMPBELL, Ch. J.: The authority is a slender one for a wide proposition.)

It is a well established rule that a prohibition shall not issue to a Court of peculiar jurisdiction, upon the apprehension merely that such Court will exceed its powers; though the remedy may be grantable if it appear, in the course of the proceedings, that such an error is, or is about to be, committed. Among the cases laying down this principle, and showing its application, are *Home* v. *Earl Camden* (4), *Chesterton* v. *Farlar* (5), case of *The Danish Ship Noysomhed* (6), *Johnson* v. *Shippen* (7). The Court cannot, in the present case, see any particular in which the Lord Mayor's Court is

(1) 5 Taunt. 234, *n.*
(2) 5 Taunt. 228.
(3) 2 Show. 506.
(4) In Dom. Proc. 2 H. Bl. 533, affirming the judgment of K. B. in *Lord Camden* v. *Home*, 4 T. R. 382, which reversed the judgment of Com. Pl. in *Home* v. *Earl Camden*, 1 H. Bl. 476.
(5) 7 Ad. & El. 713.
(6) 7 Ves. 593.
(7) 2 Ld. Ray. 982.

*exceeding its jurisdiction. Nothing has been done contrary to the due administration of justice. The bond itself is not made part of the record. It does not appear that any application has been made to the Lord Mayor's Court to stay proceedings in the suit because the Queen cannot be sued there. The present motion is *quia timet*. If the objection is taken on the trial, the Judge of the Lord Mayor's Court will deal with it, and it may be brought before a court of error: *Horton* v. *Beckman* (1), *Clark* v. *Denton* (2). [*186]

(LORD CAMPBELL, Ch. J.: The question as to jurisdiction may arise on facts not necessarily appearing by the record.)

That might be so; as in *Day* v. *Paupierre* (3). The subject-matter of this suit being within the jurisdiction of the Court on a *concessit solvere*, the proper mode of defence on the part of the Queen would have been to appear and put in a plea. The defence, that the borrowing was an act of State, would have been fully available in that form, and would, it must be presumed, have been properly disposed of by the Court. At present, this Court cannot say, on looking at the bond or certificate sued upon, that it may not be ground for an action against the Queen personally. What the law on that subject was, in the particular case, would depend on the evidence.

(ERLE, J.: The instrument itself informs the bearer that it is made by virtue of a law decreed by the Cortes and sanctioned by the Queen Regent, and of a treaty concluded by the Secretary of State. Suppose the plaintiff on his affidavit showed expressly that he could have no right in an action against the Queen individually: would the Lord Mayor's Court still be entitled to proceed? Suppose he made *it appear that his demand was like that made against the Queen of England in *The Baron de Bode's* case (4), where the grounds alleged were, to the understanding of any person acquainted with the law, a direct disaffirmance of the claim.) [*187]

It would still be matter of enquiry, on the trial, what the facts were. The instrument *primâ facie* creates a liability in London.

But, further, the garnishees here have taken issue on a fact concerning themselves exclusively; that they have not the money

(1) 6 T. R. 760.
(2) 1 B. & Ad. 92.
(3) 13 Q. B. 802.
(4) 70 R. R. 448 (8 Q. B. 208); *Baron de Bode* v. *The Queen*, 78 R. R. 407 (13 Q. B. 380).

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in their hands. After this, they cannot set up another answer, which regards the defendant only.

(LORD CAMPBELL, Ch. J.: They have an interest in it, because, if the Court has no jurisdiction, they are discharged.)

The course on an attachment is thus described in Bohun's Privilegia, p. 256. "The garnishee, if he think fit, may appear in Court by his attorney, and wage law, or plead, that he has no money in his hands of the defendants, or other special matter, or he may confess it." But, "if the plaintiff in the attachment shall obtain a verdict and judgment for the money or goods attached in the garnishee's hands, yet the defendant in the attachment may at any time before satisfaction acknowledged upon record, put in bail to the plaintiff's action upon which the attachment is grounded, and thereby discharge the judgment and proceedings against the garnishee; yea, though the garnishee be taken in execution, he shall be discharged if bail be put in as aforesaid."

(LORD CAMPBELL, Ch. J.: Would not it be special matter pleadable by the garnishee, that the defendant is a person over whom the Court has no jurisdiction?)

[*188] There is no precedent of *such a plea: and, at all events, the time for it has been let pass.

(ERLE, J.: It is not always true that a party who was entitled to object to the jurisdiction, but has allowed the cause to be tried on the other matters in dispute, cannot afterwards have a prohibition. The contrary has been held on prohibition to a county court, where title had come in question.)

In *Thompson* v. *Ingham* (1), which was such a case, the question of jurisdiction had been raised at the proper time in the county court.

(LORD CAMPBELL, Ch. J.: Do you allow that the garnishee might move for a prohibition before plea pleaded?)

He might; but not after he has put in a plea which admits the jurisdiction. An *Anonymous* (2) case in Ventris agrees with this view; and *In re Jones* and *James* (3) is a direct authority on the point.

(1) 80 R. R. 376 (14 Q. B. 710).
(2) 1 Vent. 236.
(3) 1 L. M. & P. 65 [to be reported from 19 L. J. Q. B. 257].

(ERLE, J.: My opinion in that case must be taken to have been reviewed and found wrong.)

As to the principal question: the case is, that the defendant has raised money within the jurisdiction of the Lord Mayor's Court by bonds bearing an interest payable in London. Nothing appears that can legally distinguish the funds attached from the Queen's own funds. She appears to have the controul of them all. In *The Duke of Brunswick* v. *The King of Hanover* (1), cited in moving for this rule, it was held that a foreign Prince, being in this country, could not be made amenable to the Court of Chancery for acts done in exercise of his sovereign authority: but those acts were done in his own dominions; a circumstance particularly noticed by Lord COTTENHAM in his address to the House *of Lords. In the same [*189] case, at the Rolls, Lord LANGDALE, after observing that "The law of England affords no authority for the proposition, that sovereign Princes resident here may not be sued in the Courts here," cites *De la Torre* v. *Bernales* (2), where Vice-Chancellor Sir J. LEACH ordered the King of Spain to be named as party to a suit, the object of which was to charge Bernales in respect of acts done by him as the King's agent, and "laid it down, that a foreign Government, or Sovereign, could both sue and be sued in the Courts of this country."

(LORD CAMPBELL, Ch. J.: The act in question here was not done by the Queen personally, but by her mother, while Regent.)

A person raises money in London for the Queen of Spain.

(LORD CAMPBELL, Ch. J.: The instrument is not signed by her, but by a public officer; like our Exchequer bills.)

It is not necessary that the Queen should have actually put her own seal to the bond, to render her liable. Affidavit is made in the cause that she is the party indebted. It appears that the Cortes have authorized her to borrow money; but this Court cannot judge of the nature and effect of that authority. Before the reign of Edward I., the King, even of this country, might have been sued in the Courts (3). Since the proceeding by petition of

(1) 2 H. L. C. 1; *S. C.* in the Rolls Court, 63 R. R. 1 (6 Beav. 1).

(2) 1 Hov. Supp. to Vesey, 149.

(3) See 16 Vin. Abr. 536, tit. Prerogative of the King (Q. 4). [There is no real evidence of this.—F. P.]

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right was instituted, that is no longer so; but a foreign Prince may still be sued, at least upon engagements entered into here.

(PATTESON, J.: The liability of a foreign Prince upon acts done in his own dominions came into question in *Munden* v. *Duke of Brunswick* (1); but there was no decision on the point.)

[190] *Chambers, Peacock* and *Randell, contrà:*

The suit has arrived at this point: the garnishees having pleaded, issues have been joined upon the pleas, and now stand for trial, the result of which, if the pleas be not proved, will be that execution will go against the moneys of the defendant, unless she put in bail within a year and a day to appear and try in the Lord Mayor's Court. The questions are, whether prohibition lies, and whether it is now properly applied for. Now the rule is, that a prohibition will be granted whenever the Superior Court can see that the Court below has exceeded its jurisdiction. And (assuming that the garnishees here are not entitled as parties to demand it) the prohibition may issue even at the instance of a stranger; a rule founded not only in justice to the subject but in a jealous regard to the prerogative of the Crown: for "there are two things in prohibition, 1st contempt of the Crown, and disherison of it in taking on them judicial power where they have no right; 2nd is a damage to the party:" *Ede* v. *Jackson* (2). "And the King's Courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any Court temporal or ecclesiastical doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution, as before:" 2 Inst. 602. The rule on this subject has been exemplified in the late decisions as to the county courts.

(LORD CAMPBELL, Ch. J.: Those cases, as well as *Home* v. *Earl Camden* (3), seem to press you a good deal.)

In *Home* v. *Earl Camden* (3) the Court of Appeals in cases of prize,
[*191] to which the prohibition *went, had exclusive jurisdiction over the matter which they had decided, namely, whether a certain capture was prize or not within the Prize Acts then in force: and therefore prohibition was held not to lie. But, if they had been exceeding the bounds of the common law in construing the Acts, they might

(1) 74 R. R. 467 (10 Q. B. 656).
(2) Fortes. 345.
(3) 2 H. Bl. 533; 4 T. R. 382; 1 H. Bl. 476.

have been prohibited, even after sentence, according to *Gare* v. *Gapper* (1) and *Gould* v. *Gapper* (2), and other authorities. Therefore the garnishees here are not barred by having pleaded. The principle (acted upon in *Hall* v. *Maule* (3), that a Court should not be presumed likely to exceed its jurisdiction, does not apply when the Court has entertained a suit of which, originally, it ought not to have taken cognizance. Now, in the present case, the Queen, the defendant in the suit, has never been summoned. It is not pretended that she has: but it is assumed that, because the debt arose, as it is said, within the jurisdiction, and nothing is found therein by which the defendant can be summoned, and the defendant herself is not to be found there, a summons may, by custom, be supposed. But, if it was impossible, legally, that the Queen could be summoned, a summons cannot be supposed; and it was held in a case from the Tolzey Court of Bristol, *Bruce* v. *Wait* (4), that, on general principles, a custom to issue foreign attachment without summons would be bad.

(LORD CAMPBELL, Ch. J.: The principle relied upon is, that a debt within the jurisdiction gives authority to the Court, though the debtor lives out of the jurisdiction. The law is so in Scotland.)

It ought at least to be possible that the debtor should have the opportunity of appearing. **Buchanan* v. *Rucker* (5) is another authority against the suggested custom. [*192]

(LORD CAMPBELL, Ch. J.: What is there to show that a personal service ought to be practicable?)

It is at least requisite that, if a summons were served, the summons should have force to compel the party to come in. The present case differs from others inasmuch as the defendant always was, and must be, out of the jurisdiction. This is not an objection which can be waived by pleading, in the case of a garnishee, more than if it were that of an ambassador.

(LORD CAMPBELL, Ch. J.: One difficulty you have is, that there are, as it seems, cases in which a foreign Prince may be sued, and the Court below may be proceeding to decide, but not wrongly, as to this being one of them.)

(1 3 East, 472.
(2) 7 R. R. 766 (5 East, 345).
(3) 7 Ad. & El. 721.
(4) 1 Man. & G. 1.
(5) 9 R. R. 531 (1 Camp. 63; 9 East, 192).

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The assumption, that this is such a case, should be sustained by those who allege the jurisdiction: but the contrary appears from the affidavits, the bonds, and the proceedings in the suit.

Then, has the Lord Mayor's Court any jurisdiction, for the purpose of a suit, over a Queen of Spain resident in her own dominions? In *Douglas* v. *Forrest* (1) BEST, Ch. J. said that "a natural born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation:" but he distinguished such a case from *Buchanan* v. *Rucker* (2): and he added: "To be sure if attachments issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the [*193] Legislature of *any country might authorize their Courts to decide on the rights of parties who owed no allegiance to the Government of such country, and were under no obligation to attend to its Courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him." In the present case, the consequence of a finding against the garnishees will be, that the party holding 10,000*l.* which is the money of the Spanish Government will be unable to say that it is so till the Queen puts in bail; a step by which she would acknowledge the jurisdiction of the Court. If the proceedings in this case are valid, a ship of war belonging to the Queen of Spain might be attached; an act which might lead to disastrous public consequences. This evil was pointed out by Lord LANGDALE in *The Duke of Brunswick* v. *The King of Hanover* (3), where his Lordship observed: "The cases which we have upon this point go no further than this; that where a foreign Sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross bill or bill of discovery in the nature of a defence to the proceeding, which the foreign Sovereign has himself adopted. There is no case to show that, because he may be plaintiff in the Courts of this country for one matter, he may therefore be made a defendant in the Courts of this country for another and quite a distinct matter:" and he added (4): "The defendant insists upon it as a general rule, that in times of peace at least, a sovereign

(1) 29 R. R. 695 (4 Bing. 686, 702, 703).
(2) 9 R. R. 531 (1 Camp. 63; 9 East, 192).
(3) 63 R. R. 1 (6 Beav. 1).
(4) 6 Beav. 40.

Prince is, by the law of nations, inviolable; that obvious inconveniences and the greatest danger of war would *arise, from any attempt to compel obedience to any process or order of any Court, by any proceeding against either the person or the property of a sovereign Prince; and indeed that any such attempt would be deemed a hostile aggression, not only against the sovereign Prince himself, but also against the State and people of which he is the Sovereign: that it is the policy of the law (to be everywhere taken notice of), that such risks ought to be avoided:" to which propositions his Lordship's judgment conformed. [*194]

(LORD CAMPBELL, Ch. J.: There may in any country be private property of a foreign Prince, to which these remarks would not apply.)

Lord LYNDHURST said, in *The Duke of Brunswick* v. *The King of Hanover* (1) in the House of Lords, that it was unnecessary there to define the circumstances (admitting that such might exist) under which a foreign Sovereign might be sued here for acts done abroad: but he said: "It must be a very particular case indeed, even if any such case could exist, that would justify us in interfering with a foreign Sovereign in our Courts." And Lord BROUGHAM said: "It would have been necessary where two foreign Princes came to the Courts of this country respecting a matter transacted abroad, to have disclosed such a case as would have shown clearly that it was upon a private matter, and that they were acting as private individuals, so as to give the Courts in this country jurisdiction." The process (2) here is to attach "all" "moneys, goods and effects" of the defendant without reference to their being public or private. If the property to be taken was private, that distinction should have been pointed at in *all the proceedings. [*195]

(LORD CAMPBELL, Ch. J.: You say, assuming this to be a private debt, the attachment is such that public property may be taken for that private debt.)

That is so; and the proceeding, if upheld, violates the law of nations. To that law Lord MANSFIELD, in *Triquet* v. *Bath* (3), refers the privilege of foreign ambassadors and their servants against arrest; and he notices the incident of a statute, 7 Ann.

(1) 81 R. R. 10 (2 H. L. C. 23).
(2) *Ante*, pp. 399, 400.
(3) 3 Burr. 1478, 1480.

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affidavit, and attached all such moneys, &c., as the garnishee then had, or which might thereafter come into his hands or custody, "of the said defendant, to answer the said plaintiff in the plea aforesaid."

The affidavit on which the present rule was obtained further stated that deponent had been informed and believed that the last mentioned claim of De Haber arose upon the same cause of action as that in the first action; and it repeated, as to this last action, the facts already mentioned to have been deposed to as to the first.

The affidavit also stated that another attachment issued in each action against Christy, Forster, Scholefield, Shadbolt, Oxley and Tayler, the trustees of the London Joint Stock Bank, as to which the circumstances did not differ from those of the attachments first mentioned.

In answer, on the part of De Haber, an affidavit by the Deputy Registrar of the Mayor's Court was put in, which stated the custom of London as to foreign attachments. It stated, further, that the affidavit on which the Mayor's Court granted the attachment "is not considered in the nature of an affidavit to hold to bail, and is not tested by the rules applicable to such affidavits, but is taken [*199] as a protection to the Court and suitors, *that no attachment should be made without any real debt existing between the plaintiff and defendant; and that such affidavit forms no part of the issue between the plaintiff and garnishee." "That, if upon such affidavit there should appear any patent defect in the statement or consideration of the plaintiff's debt, or such a debt as will not sustain any attachment, the Court will permit a motion to be made to dissolve the attachment upon such grounds: but such defect must appear upon the face of such affidavit; and the practice has been not to allow any question affecting merits to be entered into upon such summary proceeding; but that the said garnishee may, at any time, make an application to the Court to dissolve an attachment on special grounds. That no plea upon the trial of an attachment can be entered on behalf of a defendant, because such defendant is not in Court, and therefore cannot be a party to the issue; but, under the garnishee's usual plea of *Nil habet*, the Court is accustomed to give great latitude to all defences: but that the garnishee is not restricted to such plea, but may plead any special matter."

In last Easter Term (1),

(1) May 10, 1851. Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

Borthwick, for De Haber, showed cause:

It is true that a foreign Sovereign, sued in respect of transactions entered into exclusively in the character of Sovereign, cannot be compelled to appear in an English court of justice. But the privilege may be waived; and it is waived if it is not properly pleaded. That clearly appears *from Lord LANGDALE'S judgment [*200] in *The Duke of Brunswick* v. *The King of Hanover* (1). The case is somewhat analogous to that of an action brought against the Governor of a foreign possession of the Crown for an act done in such foreign possession; the Governor, if he insists upon his right to do the act in his character of Governor, must plead the matter specially: *Mostyn* v. *Fabrigas* (2). The Queen of Portugal, by not pleading to the jurisdiction, has submitted to it. But, further, the present question is not between the plaintiff and the Queen of Portugal, but between the plaintiff and the garnishee. The defendant cannot have a prohibition, for want of jurisdiction, before appearing in the inferior Court; and the garnishee, to take advantage of the objection, should plead it there: *Cook* v. *Licence* (3), 6 Bac. Abr. 589 (7th ed.), tit. Prohibition (K). The prohibition will then go, if the inferior Court refuse the plea so as to show unequivocally an intention to exceed the jurisdiction. If the garnishee had pleaded only *Nil habet*, the Lord Mayor's Court would unquestionably have had the right to try an issue on that plea. He might have pleaded to the jurisdiction; for he can plead whatever the defendant can: *Masters* v. *Lewis* (4). Even if the Queen of this realm had chosen, as she might, to sue as an individual (5), she must have answered to a bill of discovery touching the matter of the suit. Where an objection is taken to the jurisdiction *of a county court, the party becomes entitled to the [*201] writ of prohibition by appearing and showing the matter before the Judge, who, if he then proceed, may be prohibited: *Thompson* v. *Ingham* (6). How can the plaintiff here know in what character the Queen of Portugal opposes the attachment?

(LORD CAMPBELL, Ch. J.: Your affidavit in the Lord Mayor's Court, upon which your attachment is founded, states that she is sued as reigning Sovereign of Portugal.)

(1) 63 R. R. 1 (6 Beav. 1, in the Rolls), *S. C.*, in Dom. Proc. affirming the above decree, 81 R. R. 1 (2 *H. L. C.* 1).

(2) 1 Cowp. 161, 172, 173. See note to *S. C.* in 1 Sm. L. C. 363, 368 b, c (3rd ed.).

(3) 1 Ld. Ray. 346.

(4) 1 Ld. Ray. 56.

(5) See 16 Vin. Ab. 536, tit. Prerogative of the King (Q. 4).

(6) 80 R. R. 376 (14 Q. B. 710).

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That is not properly before the Court; nor is the affidavit really the foundation of the attachment: it is merely required to protect the Court below from acting on a frivolous suggestion. The fact of the oath need not be averred in a plea of foreign attachment: *Banks* v. *Self* (1). There is at least enough doubt to induce the Court not to prohibit without requiring a declaration in prohibition.

Sir F. Thesiger and *Bovill*, for the Queen of Portugal, *contrà*:

This is a stronger case than *Wadsworth* v. *Queen of Spain* (2), because it appears that here the original cause of action arose entirely in Portugal; the money, in respect of which the plaintiff sues, never was in England.

(LORD CAMPBELL, Ch. J.: The fund attached would appear to belong to the Queen of Portugal in the same character as that in which she is a debtor, if at all.)

That is undoubtedly so. Assuming, on the grounds urged in *Wadsworth* v. *Queen of Spain* (2), that the action does not lie against the Queen of Portugal, it does appear that the Lord Mayor's Court has exceeded *its jurisdiction. The object of the attachment is to compel a party to appear in a cause which is not within the competence of that Court. It is said that the garnishee ought to have pleaded to the jurisdiction: but, even if that were so, the Court will not, on account of his not having so pleaded, allow this action to go on against the Queen of Portugal. And, further, he was not bound to plead to the jurisdiction: as regards himself, the only question is whether he is indebted to the defendant: he may be entirely ignorant of the nature of the plaintiff's claim on the defendant. It may be questionable whether the *dictum* in *Masters* v. *Lewis* (3) be correct, that "garnishment cannot be, but where the garnishee is liable to the action of the defendant; for the garnishee may plead all things that the defendant might have pleaded."

[*202]

(LORD CAMPBELL, Ch. J.: It is the *dictum* of no less a Judge than Lord HOLT.

WIGHTMAN, J.: And it seems very reasonable.

LORD CAMPBELL, Ch. J.: The garnishee may in some cases know what the plaintiff's claim is.

(1) Note to *Harington* v. *Macmorris*, 5 Taunt. 234.

(2) *Ante*, p. 398.

(3) 1 Ld. Ray. 56.

WIGHTMAN, J.: It is said that the garnishee may plead that he has no money of defendant in hand, "or other special matter" (1).) Supposing him to have that right, his abstaining from the exercise of it cannot oust the original debtor from the right of denying the jurisdiction. Again, the Court, even on the suggestion of a stranger, will prohibit the inferior Court from exceeding its jurisdiction: Com. Dig. Prohibition (E), 2 Inst. 607. It is true that, in ordinary cases, a party sued appears, before applying for a prohibition: *Sparks* v. *Wood* (2): and a plea to the jurisdiction may be generally proper: *Lucking* v. *Denning* (3): but an appearance *and plea [*203] would be absurd and contradictory in the present case, where the objection is that the defendant cannot be called upon to appear at all. In a plea to the jurisdiction, the defendant must appear in person: 6 Bac. Abr. 235 (7th ed.) tit. Pleas and Pleadings (E.) 2.; now, where the party is not bound to appear, this Court will prohibit the enforcing process to compel appearance: *Vaughan* v. *Evans* (4). It is true that, by instituting proceedings in an English Court, the Queen of Portugal might make herself liable to answer a bill relating to those proceedings: even so, however, she would not be liable to answer another party in a different matter: *The Duke of Brunswick* v. *The King of Hanover* (5). But, in fact, she has never been a party to this proceeding at all. The privilege of a foreign Sovereign, like that of ambassadors, rests on the law of nations; stat. 7 Ann. c. 12, was only declaratory, and was passed to conciliate the Czar: *Triquet* v. *Bath* (6). Suppose the Queen instituted proceedings against the garnishee in Portugal for the debt: could he set up the English attachment as a defence?

(LORD CAMPBELL, Ch. J.: That is a question which we cannot answer.)

LORD CAMPBELL, Ch. J.:

We will take time to consider our judgment. But, without prejudice to any point which has been argued in this case, I must express very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie; and I am very sorry to find that this has been persisted in. The only question is as to *the proper mode of stopping it, whether by a [*204] plea in the Court below or by prohibition.

Cur. adv. vult.

(1) Bohun's Privilegia Londini, 256 (3rd ed.).
(2) 6 Mod. 146.
(3) 1 Salk. 201.
(4) 2 Ld. Ray. 1408.
(5) 63 R. R. 1 (6 Beav. 1); *S. C.* 81 R. R. 1 (2 H. L. Ca. 1).
(6) 3 Burr. 1478, 1480.

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LORD CAMPBELL, Ch. J., in this Term (May 28th), delivered the judgment of the COURT in both cases.

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We are of opinion that the rule for a prohibition in this case ought to be made absolute.

The plaintiff has commenced an action of debt in the Court of the Lord Mayor of London against "Her most faithful Majesty Doña Maria da Gloria, Queen of Portugal, as reigning Sovereign and supreme head of the nation of Portugal:" and, by an affidavit laid before us, it appears that the plaintiff's alleged cause of action is in respect of a sum of Portuguese money equivalent to 12,136*l.* sterling, which he had in the hands of one Francisco Ferreiri of Lisbon, banker, at the period when Don Miguel, pretending to the Crown of Portugal, was driven out of that country, and which was by the said Francisco Ferreiri paid over to the Portuguese Government now represented by the Royal defendant. The plaintiff, having entered his plaint, proceeded according to the custom of foreign attachment in the city of London, as if the defendant were subject to the jurisdiction of the Lord Mayor's Court and the cause of action had arisen within that jurisdiction; and he sued out a summons for the defendant to appear and answer the plaintiff in the plea aforesaid. A return being made by the Serjeant-at-Mace, that the said defendant had nothing within the said city or liberties thereof, [*205] whereby *she can be summoned, nor was to be found within the same (1), the plaintiff swore an affidavit, in which he stated that the defendant, "as reigning Sovereign and as supreme head of the nation of Portugal, is justly and truly indebted to him" "in the sum of 12,136*l.*, for money had and received by her said Majesty, Doña Maria da Gloria, Queen of Portugal, for and on behalf of the said nation of Portugal, for the use of this deponent, and for money taken by her said Majesty Doña Maria da Gloria, Queen of Portugal, by and on behalf of the said nation of Portugal, from the deponent's banker, with interest thereon."

The defendant being solemnly called, and not appearing before the Lord Mayor, the plaintiff alleged, by his attorney, that Senhor Guilherne Candida Xavier de Brito, of the city of London, the garnishee, had money, goods and effects of the defendant in his

(1) The proceedings in the Lord Mayor's Court (except the affidavits of debt in the two suits, and the notices of attachment in the last) were not expressly deposed to: but it was assumed in the argument that the regular course of foreign attachment had been pursued.

hands, and prayed process according to the said custom to attach the said defendant by the said money, goods and effects in the hands of the garnishee as aforesaid, so that the defendant may appear in the Lord Mayor's Court to answer the plaintiff in the plea aforesaid. Thereupon the Judge presiding in the Court awarded an attachment against the defendant as prayed, directed to the Serjeant-at-Mace, which that officer immediately executed, leaving with the garnishee a notice in the terms following.

"Senhor GUILHERME CANDIDA XAVIER DE BRITO. } 28th March, 1851.

Take notice that, by virtue of an action entered in the Lord Mayor's Court, London, against her most faithful Majesty Doña Maria da Gloria, Queen of Portugal, as reigning Sovereign and as supreme head of the nation of Portugal, defendant, at the suit of Maurice de Haber, plaintiff, in a plea of a debt upon demand of 24,000*l.*, I do attach all such moneys, goods and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid: And that you are not to part with such moneys, goods or effects without licence of the said Court. [206]

"G. T. R. REYNAL, plaintiff's attorney,
Lord Mayor's Court Office, Old Jewry.

"J. Z. GORE,
"Serjeant-at-Mace."

On the second day of Easter Term this rule for a prohibition was applied for and obtained on behalf of the Queen of Portugal.

Cause being shown against this rule and a similar rule in a similar action brought against her most faithful Majesty the Queen of Spain, various questions respecting foreign attachment were discussed, which we do not feel it necessary to determine, as we think that, upon simple and clear grounds, there has been an excess of jurisdiction by the Court of the Lord Mayor of London, against which we are bound to grant a prohibition at the prayer of the defendant.

In the first place, it is quite certain, upon general principles, and upon the authority of the case of *The* **Duke of Brunswick* v. *The King of Hanover* (1), recently decided in the House of Lords, that an action cannot be maintained in any English Court against a [*207]

(1) 81 R. R. 1 (2 H. L. C. 1), affirming the decree of the MASTER OF THE ROLLS in *S. C.*, 63 R. R. 1 (6 Beav. 1).

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foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English Court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal Court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.

The statute 7 Ann. c. 12, passed on the arrest of the Russian ambassador, to appease the Czar, has always been said to be merely declaratory of the law of nations, recognised and enforced by our municipal law; and it provides (1) that all process, whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void. On the occasion of the outrage which gave rise to the statute, Lord HOLT was present as a Privy Councillor to advise the Government as to the fitst eps to be taken; and, with his sanction, seventeen persons, who had been concerned in arresting the ambassador, were committed to prison that they might be prosecuted by information at the suit of the *Attorney-General*. Can we
[*208] doubt that, in the *opinion of that great Judge, the Sovereign himself would have been considered entitled to the same protection, immunity and privilege as the Minister who represents him?

Let us see then what has been done by the Lord Mayor of London. On a plaint being entered in his Court against "Doña Maria da Gloria, as reigning Sovereign and supreme head of the nation of Portugal," for what she had done "for and on behalf of the said nation," he summons her to appear before him; and, she being solemnly called and making default, he, with full knowledge that she was so sued, issues an attachment against her for this default, to compel her to appear. Under this attachment, all her money, goods and effects within the city and liberties of London are ordered to be seized; if she does not obey the mandate within a year and a day, these funds are to be confiscated or applied to the satisfaction of the plaintiff's demand, without any proof of its being justly due; and she can only get rid of the attachment by giving bail, to pay the sum which the plaintiff may recover, or to render herself to prison that she may be committed to the Poultry or

(1) Sect. 3.

Giltspur Street Compter. The attachment applies, not only to all the moneys, goods and effects of the Queen of Portugal then in the hands of the garnishee, but to all that shall thereafter come into his hands. The process is studiously framed to be applicable to property of the Queen as "supreme head of" the Portuguese nation. It appears from the affidavit that the plaintiff had entered a former plaint against the Queen of Portugal, which, he suggested, was against her in her individual capacity; that, upon an attachment, the garnishee pleaded *Nil habet;* and that upon this issue the *jury found a verdict for the garnishee, because all the funds in the [*209] hands of the garnishee were proved to belong to the defendant in her public capacity as Sovereign of the dominions which she governs. Were the defendant now to plead *Nil habet,* the verdict must be against him; for the funds which he holds belong to the defendant in the capacity in which she is sued. While this attachment stands, should any money raised by loan, or any munitions of war, purchased for the use of the Portuguese Government, be found within the city of London or the liberties thereof, they are all liable to be seized for the benefit of the plaintiff.

It may be right that we should mention two authorities which we have met with in our researches upon this subject, although they were not referred to in the argument, as they seem at variance with the opinion we have formed. Bynkershoek, in his treatise De Foro Legatorum, ch. iv. (1), discussing the question whether the goods of a sovereign Prince in a foreign State are liable to be judicially arrested or attached, says: "In causâ civili cum id inter privatos obtineat, ubicunque arresta frequentantur, ego nullus animadverto, cur non idem obtinere oporteat quod ad bona externorum Principum. Si ab arresto Principis temperemus ob sanctitatem personæ, quis bona Principis in alieno imperio æquè sancta esse dixerit? usu gentium invaluit, ut bona, quæ Princeps in alterius ditione sibi comparavit, sive hæreditatis, vel quo alio titulo acquisivit, perinde habeantur, ac bona privatorum, nec minùs, quam hæc, subjiciantur oneribus et tributis." But this author, who is well known to have an antipathy to crowned heads and to monarchical government, admits that other jurists differ from *him; and he [*210] goes on to cite a decision in his own country which completely overturns his doctrine. "In the year 1668, certain private creditors of the King of Spain arrested three ships of war of that kingdom, which had entered the port of Flushing, that the pursuers might

(1) Opera, vol. ii., p. 151. Leyden, 1767, fol.

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thus obtain satisfaction for their debt, the King of Spain being cited to appear at a certain day before the Judges of the Court of Flushing: but, upon the remonstrance of the Spanish ambassador, the States-General, by a decree of 12th December, 1668, ordered the authorities of the province of Zealand to liberate the Spanish ships of war, and to allow them freely to depart, at the same time directing a representation to be made to the Spanish Government to do justice to the Dutch citizens, lest it should be necessary to resort to reprisals." And there can be no doubt that, according to the law of nations, reprisals would be the appropriate remedy, not a judicial citation before a municipal Court, to be enforced by seizure of national property.

In Selden's Table Talk (Singer's Edition, p. 108 (1)) there are the following words, supposed to be spoken by that profound lawyer himself.

"The King of Spain was outlawed in Westminster Hall, I being of counsel against him. A merchant had recovered costs against him in a suit, which because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as Gondomar heard that he presently sent the money, by reason, if his master had been outlawed, he could not have the benefit of the law, which would have been very prejudicial, there being then many suits depending betwixt the King of Spain, and our English merchants."

[211] The fact here stated seems to have been credited by Lord Chancellor THURLOW, who, in *Nabob of the Carnatic* v. *East India Company* (2), "observed, that the King of Spain had been once outlawed by Selden's advice to prevent him from taking advantage of his suit." But he adds: "the outlawry was bad enough." Others have doubted whether the King of Spain ever was outlawed in the manner supposed. Legge, in his Law of Outlawry (3), p. 12. alluding to it, says: "This was a very strange case if for costs only, as it does not seem to be warrantable by law."

Such an extract from an amusing book of anecdotes cannot be considered any authority for the position that a sovereign Prince may be sued as such in our municipal Courts, and that property belonging to him in his public capacity may be seized to compel an appearance. The statement is in no way authenticated by Selden himself, and is merely a loose report of what is supposed to have

(1) Tit. Law, § 3.
(2) 1 Ves. Jr. 371, 386, *n.* (64).
(3) London, 1779.

fallen from him in conversation. It cannot be accurate; as the outlawry is first supposed to have been for non-payment of costs, and, secondly, for not appearing: and, according to the usual practice, it could not have been in Westminster Hall. We have caused search to be made for the record; but it is not forthcoming. There may *de facto* be judgment of outlawry against any sovereign Prince who does not appear after being proclaimed the requisite number of times at the county court or court of hustings, no inquiry being made whether the defendant be an alien or a natural born Englishman, an Emperor or a peasant: but this proceeding is clearly irregular; and all concerned in it *would be liable to punishment. [*212] Till stat. 2 & 3 Will. IV. c. 39 (1), there could have been no outlawry except upon a *capias*, which could not be lawfully sued out against a peer or member of the House of Commons, much less against a sovereign Prince. After outlawry, the outlaw is to be seized wherever he can be found, and imprisoned *in salvâ et arctâ custodiâ*; all his personal property is forfeited to the Queen of England; and she is entitled to the profits of all his lands. Such a proceeding is manifestly inapplicable to a foreign Sovereign, who must be supposed to be in his own dominions, and, if he were in England, could not be so sued without a breach of the law of nations and of our municipal law. The suits alleged to have been pending between the King of Spain and the English merchants, if there were any, were probably actions brought by him on bills of exchange, or arising out of some of the commercial transactions in which his Majesty was then engaged. For such matters a foreign Sovereign might and may still sue in our courts of justice: but no authority can be found for his being sued here as a Sovereign.

In the case of *The Prince Frederick*, before Lord Stowell as Judge of the Admiralty, the same view of the subject was taken by that greatest of jurists, although, from a compromise, no formal judgment was pronounced. There a Dutch ship of war had been saved from shipwreck by English sailors, who libelled her for the salvage. Objection being made that the Court had no jurisdiction, a distinction was attempted, that the salvors were not suing the King of the Netherlands, and that, being in possession of, and having a *lien upon, a ship which they had saved, the proceedings might be considered *in rem*. [*213] But Lord STOWELL saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he

(1) Sect. 5. [This statute was repealed by 42 & 43 Vict. c. 59.]

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caused a representation to be made on the subject to the Dutch Government, who very honourably consented to his disposing of the matter as an arbitrator. The case of *The Prince Frederick* is not in print; but we had an account of it from the Queen's Advocate.

Notwithstanding the *dictum* of Bynkershoek, and the outlawry of the King of Spain supposed to be related by Selden, we cannot doubt that the awarding of the attachment in the present case by the Lord Mayor's Court was an excess of jurisdiction, on the ground that the defendant is sued as a foreign potentate.

Therefore, the circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied upon. Nevertheless, after the strong assertions at the Bar that this is immaterial where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues (1). The garnishee is safe by paying under the judgment of the COURT: but the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail. No agreement of counsel to abstain from making the objection can alter the law of the land, which says that an inferior Court can only hold plea
[*214] where the cause of action *arises within the local limits to which its jurisdiction by charter or custom is confined.

We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. The plaintiff's counsel argue that, before she can be heard, she must appear and put in bail, in the alternative, to pay or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her which would be a further indignity, and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the Court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as of the defendant himself: 2 Inst. 607, Com.

(1) See *Mayor of London* v. *Cox* [1867] L. R. 2 H. L. 239, 36 L. J. Ex. 225.—A. C.

Dig. Prohibition (E.). The reason is that, where an inferior Court exceeds its jurisdiction, it is chargeable with a contempt of the Crown as well as a grievance to the party: *Ede* v. *Jackson* (1). Therefore this Court, vested with the power of preventing all inferior Courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction. What has been done in this case by the Lord Mayor's Court must be considered as peculiarly in contempt of the Crown, it being an insult to an independent Sovereign, giving that Sovereign just cause of complaint to the British Government, and having a *tendency to bring about a misunderstanding between our own gracious Sovereign and her ally the Queen of Portugal. [*215]

Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

Rule absolute (2).

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This case nearly resembles that in which we have just given judgment, but differs from it in two particulars. 1. Here the plaintiff's affidavit does not expressly state that the action is brought against the defendant as reigning Sovereign and supreme head of the Spanish nation: and, 2. The party applying is the garnishee, after pleading *Nil habet.*

The effect of the first difference is entirely done away with by the disclosure the plaintiff makes in the affidavit of his supposed cause of action, which is on a written instrument commonly called a Spanish Government bond in the form of a debenture entitled "Public Debt of Spain," signed by an officer of the Government of Spain as contractor, and purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain in the name of her daughter, the present Queen, then a minor. It is quite clear that no one could pretend upon such an instrument to bring an *action against the Queen of Spain as a private individual, supposing that she could be sued in the Lord Mayor's Court for a debt contracted by her in London in her private capacity, she having by [*216]

(1) Fort. 345.

(2) See *Westoby* v. *Day*, 2 E. & B. 605.

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the constitutional laws of Spain private property which would be answerable for such a debt.

There is here therefore an equal want of jurisdiction in the Lord Mayor's Court to entertain the suit or to summon the defendant. Nevertheless, the Lord Mayor did entertain the suit, summoned the defendant, and, upon her making default in appearing before him, with full knowledge of the alleged cause of action, awarded an attachment against her, under which money due to her in her public capacity as Sovereign of Spain was liable to be seized.

There is in this case, therefore, the same palpable excess of jurisdiction pointed out in the case of *The Queen of Portugal*. We have only to consider whether there is before us a proper party to pray for a prohibition. The Queen of Spain does not make the complaint; and it is only made by the garnishee, after pleading *Nil habet*. The plaintiff's counsel argue that the garnishee could only plead *Nil habet;* that, if the Queen of Spain has any privilege against being sued in the Courts of this country, she only can take advantage of it; that she ought to have appeared and pleaded to the jurisdiction; that by her non-appearance she must be considered as having waived her privilege; that there has been no excess of jurisdiction at any rate as far as the garnishee is concerned; that it must be presumed that the Lord Mayor's Court will do its duty; and that, if it decide improperly, the remedy is a writ of error by which the record may finally be brought into this Court. But we *are clearly of opinion that in a [*217] case of this sort, if the garnishee comes in time, he may be heard in this Court and a prohibition may be granted at his instance. Here there neither was nor could be any personal summons; the defendant could not be required to appear without a breach of the law of nations; the plea to the jurisdiction could only have been pleaded by her in her proper person; the garnishee has an interest in setting aside an attachment improperly executed if he has funds of the defendant in his hands; for, although he would be discharged according to the law of this country by payment under the judgment of the Lord Mayor's Court, the law of Spain may not recognise such a payment; he is prevented from applying the funds in payment of a debt which may afterwards become due to himself from the Spanish Government: and at all events he is "a stranger" on whose information and complaint of the excess of jurisdiction in contempt of the Crown we should be

bound to correct it by a prohibition. If the record fully disclosed the error into which the inferior Court has fallen, after there has been an excess of jurisdiction, a prohibition and not a writ of error is the appropriate remedy.

Has the garnishee then, by pleading *Nil habet*, disqualified himself from coming before us to pray for the prohibition? We think not. He was bound to put in a plea, that he might avoid judgment; and, before the trial of the issue upon that plea, and within a reasonable time after pleading it, he applies for a prohibition to prevent further proceedings in an action which ought never to have been commenced. *Hoc statu*, a stranger might successfully apply for a prohibition; and, surely, so may the garnishee.

To show that a prohibition could not be applied for till the objection relied upon was specifically made in the inferior Court and overruled, the plaintiff's counsel mainly relied upon the two cases of *Home* v. *Lord Camden* (1) and *Chesterton* v. *Farlar* (2). In the former case it was held by the House of Lords, in conformity with the advice of all the Judges, that, whether the misinterpretation by an inferior Court of a statute, the consideration of which is confessed to be within its jurisdiction, be a ground for a prohibition, or be not rather a matter of appeal, in such case a prohibition will not lie unless it be made to appear to the superior Court that the party applying for the prohibition has in the inferior Court alleged the grounds for a contrary interpretation of the statute on which he appears for the prohibition, and that the inferior Court has proceeded notwithstanding such allegation. But the opinion of the Judges, delivered by Lord Chief Justice EYRE, on which the House acted, was founded entirely upon the reason that the inferior Court (the Commissioners of Prizes) had committed no excess of jurisdiction, and therefore that a misconstruction of the Act of Parliament was rather the subject of an appeal than of a prohibition. He says (3): "The complaint made to the temporal Court is not that the sentence is wrong, which indeed the temporal Court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the Prize Court to carry it into execution." In *Chesterton* v. *Farlar* (2) a party *who had appealed from the Arches Court to the Queen in Council, the appeal being referred

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[*219]

(1) 2 H. Bl. 533.
(2) 7 Ad. & El. 713.
(3) 2 H. Bl. 546.

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by her to the Judicial Committee, while the appeal was pending and before any proceeding had been taken in that Court, moved the Court of Queen's Bench for a prohibition, on the ground that a Church rate on which the suit had been commenced in the Consistory Court was bad, as appeared by the pleadings there. The Court of Queen's Bench (I think very properly) held that a prohibition could not be granted on this ground, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having been taken there, and this Court refusing to presume that the Judicial Committee would act incorrectly. Lord DENMAN, having pointed out that the Court before which the cause then was had jurisdiction over it, and had not fallen into any mistake, adds: "If, in the progress of the cause, the" "Court should commit any error, if they do anything against common law or Acts of Parliament, we may then interfere." But, in the case at Bar, the inferior Court had no jurisdiction to entertain the cause; and, before the prohibition was applied for, the inferior Court had committed a manifest error and had clearly exceeded its jurisdiction by summoning the Queen of Spain, and issuing an attachment against her.

Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city of London, and in violation of the universal law by which all civilized nations are [*220] bound. It gives us great satisfaction, therefore, to be able, *consistently with the decisions of our predecessors, and the principles by which they have been guided, to grant the relief which is prayed. If we had entertained any grave doubt upon the subject we should have directed the applicant to declare in prohibition: but, being clearly of opinion that there is an excess of jurisdiction in the Court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.

Rule absolute.

REG. *v.* HASLAM AND HOWARTH (1).

1851.
May 31.
June 11.

(17 Q. B. 220—229; S. C. 15 Jur. 972.)

[220]

The occupiers (not being owners) of premises were rated for them to the poor as for "Chemical works, lands and buildings." Part of the works consisted of "chambers" used for the manufacture of sulphuric acid. The chambers were vessels of sheet lead, weighing each several tons, 13 feet high, 13 wide, and from 40 to 60 long; the lower part forming a dish 12 inches deep, in which the acid was deposited; the upper shutting down upon the lower and receiving vapour. They stood in the open air; each was surrounded by walls of strong masonry forming an oblong, which was filled up with sand; and the chamber rested upon the sand, being also supported by and rivetted to a frame of wood which ran round the tops of the walls. The wooden frame was in some instances laid in mortar on the tops of the walls; in others it merely rested upon them. At each end of the chamber was a pipe to convey gases and vapours in and out; each pipe was fixed, at its extremity, into buildings which were part of the freehold. Where the pipes entered and passed out of the chamber, the lead of the chamber was beaten round the pipe, and the insertion was made vapour-tight by luting. Steam (necessary to the manufacture) was conveyed into the chamber, also by a pipe, which passed from the boiler and was rivetted to the wooden frame-work. The boiler was affixed to the freehold, and the pipe to the boiler. Every pipe might be removed by taking it to pieces, or by unfastening the rivets, without injury to the freehold: and then the chamber would rest on the ground by its mere weight, and might, with sufficient force, be lifted from the soil without displacing any part of the freehold. In a case stated for the opinion of this Court, the Sessions found that the chambers were attached to the freehold in manner before mentioned, but not affixed thereto:

Held that, assuming the chambers not to be so annexed as to form part of the freehold, yet, being fixed machinery, attached to buildings, and necessarily so attached for the purpose of being used, they were properly considered in the rate as increasing the rateable value of the buildings: and a rate calculated on such increased value was confirmed.

ON appeal against a rate for the relief of the poor of the township of Great Bolton in the borough of *Bolton in the county of Lancaster, the Sessions confirmed the rate, subject to the opinion of this Court upon a special case. [*221]

The case set forth the rate appealed against, by which the appellants were assessed at 22*l.* 15*s.* 9*d.* upon "Chemical works, lands, tenements, erections and buildings," occupied by them; owners, Robert Howarth's executors; gross estimated rental, 272*l.* 7*s.* 3*d.*; rateable value, 227*l.* 17*s.* After stating that the appellants were in fact the occupiers, the case proceeded as follows.

Certain chambers, hereinafter described, and which were used for the manufacture therein of sulphuric acid, were erected in

(1) Foll. *Tyne Boiler Works* v. *Longbenton Overseers* (1886) 18 Q. B. D. 88, 56 L. J. M. C. 8.—A. C.

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manner hereinafter mentioned on the said lands, and were used in the occupation of such chemical works, lands, tenements, erections and buildings: and the said chemical works, lands, &c., were in the said rate assessed at an increased value in consequence and by reason of such chambers and of the user thereof.

The case then stated that the appellants objected that they were assessed too highly, and were not liable by law to be rated or assessed in the said rate, either on account of the chambers, or for any increased value of the said chemical works, lands, &c. arising from the use of the said chambers. The respondents maintained the contrary. It was further stated that the annual rateable value of the said chemical works, lands, &c., exclusive of the increased value arising from the chambers, was 162*l.* 11*s.* 5*d.*; inclusive of such value, 227*l.* 17*s.* The residue of the case was as follows.

The said chambers are constructed in manner following. The said chambers are placed upon the land in the open air, and are [*222] not in any way inclosed in or *covered by any building or erection. The chambers occupy large spaces of ground: their respective lengths vary from 40 feet to 60 feet: each of them is 13 feet high; and the average width of each is about 13 feet. Each of such chambers is a very large vessel of sheet lead, weighing several tons, and is composed of two parts; the lower part is a dish about 12 inches deep, in which the acid is deposited; and the upper part shuts down on the lower and receives the vapour.

The mode of erecting such chamber is as follows. In some instances the soil has been excavated for the purpose of erecting foundation walls of strong masonry; in others these walls stand upon the natural level of the ground. The walls are built in the shape of an oblong; and the inside is filled with sand and other materials to a level with the top of the walls. The chamber rests on the sand; a sill, composed of four strong beams of wood, runs along the top of the walls, on which is fixed a frame work of wood which encompasses the chamber and is used for its support. The chamber is attached to the frame work by leaden rivets. In some of the more ancient chambers the sill is placed on mortar which has been spread on the top of walls for the purpose of preserving the level; but in the more modern instances the sill rests on the top of the walls without the assistance or aid of mortar or any other such substance.

At each end of the chamber there is a pipe for the purpose of conveying the gases and vapours into and out of the chamber: both

are at their extremities fixed into buildings which are part of the freehold; but the pipe which conveys the gas and vapour into the *chamber enters the chamber in the following manner. A circular hole is cut into the chamber, through which the pipe is inserted; and the lead of the chamber is then beaten round the pipe: the whole is rendered vapour tight by means of a luting of white lead and other materials. The pipe which conveys the vapour from the chamber is fastened to the chamber in the same manner; and it consists of several short pieces of pipe which slide into each other like the joints of a telescope, and are rendered vapour tight by means of luting. It is necessary in the process of manufacture to convey steam into the chamber; and it is conveyed from the boiler by means of a pipe which is attached to the frame work before mentioned by leaden rivets. The boiler is affixed to the freehold; and the pipe at that extremity is affixed to the boiler. That pipe may be removed at pleasure, without injury to the freehold, by unfastening the rivets which attach it to the frame work; and the pipes conveying the gases into and from the chambers may also be removed at pleasure, and without injuring the freehold, by withdrawing the pieces of which the pipes are composed. When these pipes are so withdrawn, the chamber rests on the ground by its mere weight, and, if sufficient force were used, might be lifted from the soil without displacing any part of the freehold. [*223]

The chambers are attached in manner before mentioned to the freehold, but are not affixed thereto.

It was proved that personal property was not rated in the said township to the relief of the poor.

Upon the above facts, the COURT found that the said chambers were attached in manner before mentioned to *the freehold, but were not affixed thereto: and the COURT confirmed the rate, subject to the opinion of the Court of Queen's Bench. The questions for the opinion of the Court are: [*224]

1. Whether, on the before mentioned statement of the building and annexation, the said chambers are affixed to the freehold.
2. Whether, if the said chambers are not, under the said circumstances of building and annexation, affixed to the freehold, the land and buildings are liable to be rated at a greater amount by reason of the use of those chambers on the land.

If the opinion of this Court should be in the affirmative on either question, the rate was to be confirmed; if to the contrary on both

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questions, the rateable value to be reduced to 162*l.* 11*s.* 5*d.*, and the rate to 16*l.* 5*s.* 3*d.*

The case was now argued (1).

Hall, in support of the order of Sessions:

As to the first question: the case finds that the chambers are "attached" to the freehold but not "affixed thereto."

(COLERIDGE, J.: This question seems to be one of fact.

PATTESON, J.: I do not know what is meant by "attached" to the freehold, but not "affixed." Whether they are really let into the land or not, would be a question of fact; whether they would go to heir or executor, would be a point of law.)

The facts found show that the chambers are affixed to the freehold.

[*225] But, assuming that they are not, the premises *are rateable in respect of them, because they make the occupation more valuable. This principle of rating was established by *Rex* v. *St. Nicholas, Gloucester* (2), and *Rex* v. *Hogg* (3).

(COLERIDGE, J.: In those cases there was, in any view of the question, some rateable subject.)

So there is here; the foundation walls, the boiler, and the pipe serving as a chimney. Among the later cases are *Rex* v. *The Birmingham and Staffordshire Gas Light Company* (4) (where the word "attached" occurs in the judgment), *Reg.* v. *Guest* (5), and *Reg.* v. *Southampton Dock Company* (6). It is true that part of this machinery might be removed without disturbing anything which is fixed to the freehold; that is the case also with a crane or a steam-engine; but the severance would make the whole useless. The appellants are not owners, but they are occupiers of the land; and the use of this machinery is a mode of enjoying the occupation, not the freehold. If they assigned their chemical works, the entire subject-matter of this rate would pass by their assignment. The premises, if let for carrying on chemical works with this machinery, would bring an advanced rent.

(1) Before Patteson, Coleridge and Erle, JJ. Lord Campbell, Ch. J. had left the Court.

(2) Cald. 262; *S. C.* 1 T. R. 723, *n.* (*a*). See *Reg.* v. *Leith*, 1 E. & B. 121; *Reg.* v. *Morrison*, 1 E. & B. 150.

(3) 1 R. R. 375 (1 T. R. 721).

(4) 45 R. R. 572 (6 Ad. & El. 634).

(5) 45 R. R. 842 (7 Ad. & El. 951).

(6) 80 R. R. 324 (14 Q. B. 587).

Cowling, contrà:

The first point is expressly decided by the Sessions.

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(PATTESON, J.: They put a question to us upon it: but, if this point were the material one, we should perhaps refer it back to the Sessions.)

As to the second point: the appellants raise no question of form, and will consider the rate as laid upon land increased in value by machinery. Then, the chambers *are neither literally nor substantially fixtures. They are rather stock in trade than anything forming part of "lands" within the meaning of the poor laws. The furnaces and other buildings are rateable; but the chambers are only receptacles for the vapour and steam carried in by the pipes, with dishes to contain the acid. The rolling stock of a railway might as well be deemed fixtures. The chambers, if of a smaller size, might be held by manual strength to receive the vapour; and weight merely cannot make them fixtures: a ship is but a personal chattel. The pipes merely connect them with other machinery; they do not incorporate them with the land or walls. To be rateable upon the principle secondly relied upon, they ought, for the time at least, to be part of the land. The case does not show that they have ever been rented by a tenant.

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(PATTESON, J.: If the occupiers underlet the works they would get a higher rent on account of these additions.)

So a house lets for more money if furnished. These chambers are merely conveniences which the occupier of the works might from time to time add or remove as his business increased or diminished.

(COLERIDGE, J.: The case does not state who erected them.)

It is defective in that, and perhaps ought to be restated. As to the cases cited for the appellants. In *Rex* v. *St. Nicholas, Gloucester* (1), the weighing machine had the character of a fixture; it had always belonged to the house; and it was considered by Lord MANSFIELD as annexed to the freehold. In *Rex* v. *Hogg* (2), the carding engine was considered as part of the house. The language of Lord DENMAN in *Rex* v. *The Birmingham and Staffordshire Gas Light Company* (3),

(1) 1 R. R. 376 (1 T. R. 723, *n.* (*a*), S. C. Cald. 262).
(2) 1 R. R. 375 (1 T. R. 721).
(3) 45 R. R. 572 (6 Ad. & El. 634).

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relied *upon by the respondents, is certainly strong; but there, as appears by the statement of the case, the steam engines and other
[*227] machinery were fixed to the land and buildings. In *Reg.* v. *Guest* (1), the judgment is very generally expressed; and the attention of the COURT is directed chiefly to the exclusion of certain tests of rateability. A literal application of the language in this and the last preceding case would authorize rating furnished houses in respect of the furniture. In *Rex* v. *Bradford* (2), the privilege of the canteen, which enhanced the value of the house, was treated as a thing appurtenant to and not to be divided from it. In *Reg.* v. *Southampton Dock Company* (3), the cranes, steam engines, and other fixed plant, were not only ponderous, but incorporated with the freehold. Here the subject of rate is a thing detached, a mere utensil, and not such a fixture as the Courts have allowed to be taken into consideration in estimating rateable value.

Cur. adv. vult.

PATTESON, J., on a subsequent day of the Term (June 11th), delivered the judgment of the COURT:

We do not think it necessary in this case to determine whether the chambers erected on the appellants' premises are or are not annexed to the freehold, which is rather a question of fact for the Court of Quarter Sessions to find than for us to decide: because we are of opinion that, according to the principle laid down in the various cases on this subject, the rateable value of the premises is
[*228] undoubtedly increased by the use of *those chambers. In *Rex* v. *The Proprietors of the Liverpool Exchange* (4) the COURT, after citing several previous decisions, say: "These cases establish the principle, that the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into the account in estimating its rateable annual value, wherever those advantages would enable the owner of the building to let it at a higher rent than it would otherwise fetch." And again, in *Reg.* v. *Guest* (5) the COURT state the general principle to be, "that real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a *fieri facias*, or whether it would descend

(1) 45 R. R. 842 (7 Ad. & El. 951).
(2) 4 M. & S. 317.
(3) 80 R. R. 324 (14 Q. B. 587).
(4) 1 Ad. & El. 465.
(5) 45 R. R. 842 (7 Ad. & El. 951, 956).

to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant:" and the COURT referred to *Rex* v. *Birmingham and Staffordshire Gas Light Company* (1), where the same principle was laid down. All these cases have lately been brought before the Court, and recognised as well as decided, in the case of *Reg.* v. *Southampton Dock Company* (2). Indeed, on the argument in the present case, the attempt was rather to show that the chambers did not come within the principle so laid down than to attack the principle itself; and it was urged that the chambers were rather of the nature of moveable utensils or machines, or of furniture in a dwelling-house, than of fixtures. It is, however, plain from the facts stated that they are used as part of the fixed machinery of the works, attached to the other buildings for the purpose of being so used, and necessarily *so attached in the use of them, although [*229] capable perhaps of being removed without injury to the other buildings. Nor can it be denied that, if the appellants were to underlet the premises, they would fetch a higher rent as they now stand, with these chambers upon them, than they would if the chambers were removed.

We are therefore of opinion that the rate and the order of Sessions must be confirmed.

Order of Sessions confirmed.

COOKE *v.* CUNLIFFE.

1851. *June* 3.

(17 Q. B. 245—260; S. C. 15 Jur. 1076.)

[245]

M. by will devised her estates to her son-in-law B. for life, remainder to her daughter F. his wife for life, remainder to trustees to preserve contingent remainders, remainder to the use of the children of the marriage as B. and F. should jointly appoint by deed, or as the survivor should appoint by deed or will, and, in default of appointment, to the use of trustees for a term of 500 years to commence on the death of the survivor of B. and F., and, subject thereto, to the use of P., eldest son of B. and F., in strict settlement. The trusts of the term were, 1st, on request of B. and F. to raise 10,000*l.* for B. and F., and, 2ndly, to raise for each younger child of B. and F. any sums not exceeding 1,000*l.* a-piece, as B. and F. jointly by deed, or the survivor by deed or will, should appoint, and in default of appointment 1,000*l.* a-piece, payable after the decease of the survivor of B. and F., unless they or the survivor should appoint the same to be raised in his or her lifetime, in which case the term was to commence on such last-mentioned appointment

F., the wife, died, leaving B. her surviving, without having joined in any appointment under the will; and leaving four sons besides P., and a daughter. On the marriage of the daughter, B. by deed appointed to her 1,000*l.* payable on his decease. After this B. made his will, by which he

(1) 45 R. R. 572 (6 Ad. & El. 634). (2) 80 R. R. 324 (14 Q. B. 587).

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gave a legacy to his daughter, and to each of his other younger children bequeathed "such a sum of money as with" what they are entitled to under (amongst other settlements referred to) "the will of M., will make up to each 8,000*l.*: and "all the residue of my personal estate and all my real estate over which I have any disposing power I give" &c. to P. and his heirs. At the time when this will was executed, B. resided on an estate derived from his own family, which was partly settled and partly held in fee:

Held, that the devise of "all my real estate over which I have any disposing power" was under the circumstances to be construed as a devise of the unsettled patrimonial estate of B., and did not operate as an execution of the limited power of appointment over the estates which he held as tenant for life under M.'s will.

BY an order of Vice-Chancellor KNIGHT BRUCE in this cause, a case, of which the substance is stated below, was sent for the opinion of this Court.

Mary Pulestone, being seised in fee simple of the castle and [*246] manor or lordship of Ewloe in Flintshire, and *other lands in the counties of Flint and Denbigh, made her will, dated 19th September, 1802, duly executed in manner then required by law. This will was set out in the case.

By it she devised her estates to the use that two trustees named should, during the joint lives of Bryan Cooke, her son-in-law, and her daughter Frances, his wife, raise 400*l.* per annum for her said daughter; subject thereto, to the use of the said Bryan Cooke for life; remainder to the use of the said Frances Cooke for life; remainder to trustees to preserve contingent remainders.

"And, from and after the decease of the survivor of them the said Bryan Cooke and Frances his wife, to the use and behoof of all and every or such one or more of the child or children of the body of the said Bryan Cooke on the body of my said daughter Frances Cooke his wife begotten or to be begotten, for such estate or estates and interest, either with or without power of revocation, and in such parts, shares and proportions, and with such terms and provisions for the portions and maintenance or for the benefit and advancement of any such child or children, as they the said Bryan Cooke and Frances his wife shall jointly, at any time during their joint lives, by any deed or deeds, writing or writings, to be by both of them signed, sealed and delivered in the presence of two or more credible witnesses, or as the survivor of them shall, in default of any such joint appointment, by any deed or deeds, writing or writings, to be signed by such survivor after the decease of one of them, in the presence of the like number of such witnesses, or by his or her last will or testament in writing, to be signed,

published and declared in the *presence of three or more such witnesses, devise, direct, limit or appoint; and, in default of all or any such devise, direction, limitation or appointment, or, if any such shall be made, when and so soon as the estates and interests thereby to be limited, devised or appointed shall respectively end and determine, and as to such part and parts of the same premises whereof no such devise, direction, limitation or appointment shall be made," to the use of Anthony Hardolf Eyre and Saint Andrew Ward, their executors, administrators and assigns, for a "term of 500 years to commence from the decease of the survivor of them the said Bryan Cooke and Frances his wife," without impeachment of waste, upon the trusts after mentioned. And, from and after the expiration or other sooner determination of the said term of 500 years, and, in the mean time, subject thereto and to the trusts thereof, to the use of Philip Davies Cooke, eldest son of the said Bryan Cooke by the said Frances Cooke his wife (meaning the said plaintiff Philip Davies Cooke), in strict settlement, with remainders over to the second and other sons of Bryan Cooke and Frances his wife. [*247]

The trusts of the term of 500 years were declared to be, upon trust, when thereunto required by the said Bryan Cooke and Frances his wife at any time during their joint lives, to raise by mortgage or sale of the said term of 500 years, or of all or any of the said hereditaments and premises so limited for the said term, any sums not exceeding in the whole 10,000*l.*, and pay the same unto the said Bryan Cooke and Frances his wife for his and their own proper use and uses. "And upon further trust, in case there shall happen to be one or more child or children of the body of the said Bryan *Cooke on the body of the said Frances Cooke his wife begotten or to be begotten, other than an eldest or only son, or such other son of the body of my said daughter, either by the said Bryan Cooke or by any such after taken husband or husbands as aforesaid, as may by virtue of the trusts, devises or limitations herein contained become entitled to the possession and inheritance of the said premises hereby given or devised unto or in trust for my said daughter during her life as aforesaid; then upon trust that they the said Anthony Hardolf Eyre and Saint Andrew Ward, or the survivor of them, or the executors, administrators or assigns of such survivor, do and shall by sale or mortgage of my said castle, manors &c., or by the perception of the rents and profits of the same for all or any part of the said term of 500 years, or by [*248]

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such other ways and means as they shall think fit, so as not to impeach or prejudice the raising and payment of the said yearly rent of 400*l.* hereby before limited to or provided for my said daughter Frances Cooke," raise any sums of money not exceeding the sum of 1,000*l.* a piece, over and above the costs, charges and expenses attending the raising thereof, for or towards the portion or portions of such child or children (except Philip Davies Cooke, or such other son of Frances Cooke as might after her decease be entitled to the immediate possession and inheritance of the said premises), to be paid and payable to such child or children at such time and in such proportions as Bryan Cooke and Frances his wife shall by any joint deed or deeds executed in the presence of two witnesses jointly appoint; and, for default of such joint appointment, then at such time and in such proportions as the survivor by his or her deed or deeds executed in the presence of two witnesses, [*249] or by his or her last will &c., should *appoint; and, in default of such appointment, then upon trust to raise "the said sum of 1,000*l.* a piece for or towards the portion or portions of all such children of my said daughter Frances Cooke not being an eldest son as aforesaid:" the portions of sons to be paid at the age of twenty-one, and the portions of daughters to be paid at the age of twenty-one or marriage, "which shall first happen, if such respective times of payment shall happen after the death of the said Bryan Cooke and of my said daughter Frances Cooke; but, if in the lifetime of them or either of them, the same to be paid within six months next after the decease of the survivor of them; unless the said Bryan Cooke and Frances his wife or the survivor of them shall direct or appoint the same to be raised in his or her lifetime, which they respectively may do if he, she or they shall so think proper; and in such case the said term of five hundred years shall commence and take effect from the time of such direction or appointment as last aforesaid." There were powers for the maintenance and advancement of the children while minors.

The case then proceeded as follows.

The said testatrix Mary Pulestone died on or about the 23rd September, 1802, without having revoked or altered her said will. The said Frances Cooke, the daughter of the testatrix, died on or about the 8th of January, 1818, leaving the said Bryan Cooke her surviving, and without having joined with the said Bryan Cooke, her said husband, in requiring the trustees of the said term of five hundred years, limited by the said will of the testatrix Mary Pulestone

as aforesaid, to raise the said sum of 10,000*l.*, or any part thereof, or in exercising any power or authority given to them jointly by the said will. The said Bryan Cooke, the *father of the plaintiff Philip Davies Cooke, duly made, signed and published his last will and testament in writing, bearing date 17th April, 1821, and executed by him in the presence of and attested by three witnesses, and which was set out. The material part was as follows. [*250]

"This is the last will and testament of me, Bryan Cooke of Ouston in the county of York, Esquire. I give and bequeath the sum of 2,000*l.* to my daughter Frances Mary, wife of William Margesson, Esquire; and I direct that my executors hereinafter named do pay the said sum of 2,000*l.* into the hands of the trustees for the time being of my said daughter's settlement, to be invested by them in their names in Government or real security, to be held by the said trustees on the same trusts and to and for the same ends, intents and purposes as are expressed in the said trustees of my daughter's portion thereby vested in the said settlement. I give to each of my younger sons such a sum of money as, with the fortunes which they are entitled to under the settlement made on my marriage with their mother, and under the wills of their late grandmother Mrs. Mary Pulestone, and their late aunt Mrs. Frances Pulestone, will make up to each 8,000*l.*: and in case my personal estate shall be insufficient to pay the said several legacies I charge my real estates with the payment thereof: but, in the event of my said sons dying under the age of twenty-one years, I will that the legacy of such son so dying shall sink into my residuary personal estate. I direct that, until such legacies are paid, they shall carry interest at 5*l.* per cent. from the time of my decease."

He then bequeathed several legacies; and the will proceeded. "All the residue of my personal estate and *all my real estate over which I have any disposing power I give, devise and bequeath to my eldest son Philip Davies Cooke" (meaning thereby the plaintiff), "his heirs or assigns, or, in the event of his decease in my lifetime, to such other of my sons as shall be my eldest son at the time of my decease, and to his heirs and assigns; and I appoint my son Philip Davies Cooke, the said Anthony Hardolf Eyre and William Bryan Cooke, and the survivor of them, guardians and guardian of my children during their respective minorities; and I give, devise and bequeath all estates of which I am seised and possessed in trust or by way of mortgage unto the said Anthony Hardolf Eyre and William Bryan Cooke, their executors, [*251]

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administrators and assigns, according to the natures of the same estates respectively, upon trust to reconvey or transfer the same to the several persons who are or shall be beneficially entitled to the same, or to such uses and upon such trusts as they respectively shall direct."

The said Bryan Cooke died on or about the 14th December, 1821, without having revoked or altered his said will.

At the date of his said will the said Bryan Cooke resided in the mansion on the family estates situate in the county of York, which were considerable, and of which he was tenant for life under settlements executed on his marriage with the mother of the plaintiff; and the said testator was at the date of his said will seised in fee simple of other estates adjoining the said family estates.

There was issue of the body of the said Bryan Cooke on the body
[*252] of the said Frances Cooke his wife begotten, five *children, viz. his eldest son, the plaintiff Philip Davies Cooke, and four younger children, Robert Bryan Cooke, Anthony Cooke, William Bryan Cooke, and Mary Frances Cooke, all of whom attained twenty-one. The said Mary Frances Cooke, in the lifetime of the said Bryan Cooke, and before the date of his said will, that is to say in the month of May, 1818, intermarried with and became the wife of the Reverend William Margesson; and on that marriage, by an indenture dated 19th May, 1818, and made or expressed to be made between the said Bryan Cooke of the one part and the said Mary Frances Cooke of the other part, and which was executed by the said Bryan Cooke in the presence of two witnesses, the said Bryan Cooke, pursuant to and by force and virtue and in exercise and in execution of the powers or authorities vested in him the said Bryan Cooke under and by virtue of the said will of the said Mary Pulestone, and of all other powers and authorities enabling him the said Bryan Cooke in that behalf, did direct, limit and appoint that the sum of 1,000*l.* should, upon the decease of him the said Bryan Cooke, be raised out of the estates devised by the will of the said Mary Pulestone for the portion of the said Mary Frances Cooke, and should become a vested interest in her the said Mary Frances Cooke upon the execution of the now stating indenture by him the said Bryan Cooke.

The 1,000*l.* portion of one of the younger sons of the said Bryan Cooke remains unpaid. The portions, of 1,000*l.* each, of Bryan Cooke's other younger children have been paid to them by parties who have taken assignments of such portions.

These portions of 1,000*l.* each were referred to by *the testator Bryan Cooke in that part of his will in which he referred to the will of Mrs. Mary Pulestone, the late grandmother of his younger sons. [*253]

The questions for the opinion of this Court were by the VICE-CHANCELLOR'S order directed to be:

1. Whether the said term of five hundred years limited by the said will of the said Mary Pulestone is a subsisting term.

2. Whether the said Philip Davies Cooke is seised for an estate of inheritance in fee simple of the said castle, manor, lands and hereditaments so devised by the said will of the said Mary Pulestone as aforesaid, subject to the said term or otherwise, or whether he is only tenant for life of the same hereditaments.

Malins, for the plaintiff:

The question is whether the will of Bryan Cooke is an execution of the power conferred on him by the will of Mrs. Pulestone. No formal or technical words are necessary for the due execution of a power. All that is required is that an intention in the donee of the power to execute it should appear; and for that purpose it is sufficient if the words used refer either to the power itself, or to the subject-matter. In the present case the devisor clearly intended to give the plaintiff all he could. He gives him "all my real estate;" that taken alone includes everything strictly the devisor's; he then adds words which, if he intended to give him also the real estate not properly his, but the subject-matter of the power of which he was the donee, are a concise but effectual reference to it: on any other supposition they are surplusage. He says "All my real estate over which I have any disposing power."

(LORD CAMPBELL, Ch. J.: In *your construction you give no effect to the word "my.") [*254]

Had the words used been "all the real estate over which I have any disposing power" the case would have been too clear for argument. And, when a person has an interest in an estate, "my" and "the" as applied to it are convertible terms: *Standen* v. *Standen* (1), *Bailey* v. *Lloyd* (2).

(LORD CAMPBELL, Ch. J.: Undoubtedly the words "my estate" may be used so as to show that the testator meant by them "the

(1) 2 Ves. Jr. 589; see 22 R. R. 202 *n*. (2) 29 R. R. 30 (5 Russ. 330).

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estate" not strictly his; but it must depend on the context. You cannot lay it down as a general canon of interpretation that the word "my" used in a will is equivalent to "the.")

The words "over which I have any disposing power" are in themselves equivalent to "over which I have a power of appointment;" so that a part of the will would be inoperative unless applied to the power; and the case is brought within the principle of *Wallop* v. *Lord Portsmouth*, reported in Sugden on Powers (1), and of *Bennett* v. *Aburrow* (2).

Peacock, contrà:

The leading case on this subject is *Roake* v. *Denn* (3). There ALEXANDER, C. B., delivering the unanimous opinion of the Judges in the House of Lords, says (4): "There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with *Sir Edward Clere's* case (5), [*255] in the *reign of Queen Elizabeth, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property, which was the subject of it; or unless the provision made by the person intrusted with the power would have been ineffectual, would have had nothing to operate upon, except it were considered as an execution of such power or authority." This opinion, which was adopted by Lord LYNDHURST, L. C., and Lord TENTERDEN, may be considered as the law on the subject. Each of the cases cited in the argument for the plaintiff will be found to be an application of the principles there laid down.

In the present case, it is conceded that there is no direct reference to the power. Is there, then, any reference to the subject-matter of the power; or (which may be said to be the same question) is there anything not the subject-matter of the power which will satisfy the description in the will? To answer this, the state of facts must be looked to. Bryan Cooke, at the time when he made his will, had

(1) 7th ed., vol. 1, p. 377; vol. 2, p. 547.

(2) 7 R. R. 131 (8 Ves. 609).

(3) 33 R. R. 1 (4 Bligh, N. S. 1); affirming the judgment of K. B. in *Denn* v. *Roake*, 5 B. & C. 720, which reversed the judgment of the Common Pleas in *Doe* d. *Nowell* v. *Roake*, 2 Bing. 497.

(4) 33 R. R. 12 (4 Bligh, N. S. 17).

(5) 6 Co. Rep. 17.

estates in Yorkshire, on which he resided, which came from his father's family, and were properly speaking his. Part of those estates were settled so that he had no power to dispose of them at all. Part were his in fee simple; and he had complete disposing power over that portion. There were also the Welsh estates, which had belonged to his deceased wife's mother, and in which he had, under her will, a life interest, and a power, not to dispose of them absolutely, but to appoint them among a class, his sons. Under these circumstances, he devises to the plaintiff "all my real estate over which I have any disposing power." Had the plaintiff not been one of the class in whose *favour a power under Mary Pulestone's will could be exercised, for instance supposing he had been a nephew, these words would have all been satisfied. It would then have been clear that the testator intended by this description to give him his unsettled Yorkshire estate. The plaintiff is a son, one of the class in whose favour a power over the Pulestone estates could be exercised; but there is nothing to show that the intention of the testator was to exercise the power. On the contrary, the manner in which he provides for his younger sons shows that he did not intend to exercise it. They were entitled to 1,000*l.* a piece under the trusts of a term, which was not to arise except in default of the exercise of this power. The testator knows this: he does not in an inartificial manner appoint that they shall take 1,000*l.*, or any other sum, but gives them from other sources so much money as may, in "addition to what they are entitled to under the will of their late grandmother," make up 8,000*l.* It is in effect as if he had said, "if I do not exercise the power I possess, they will each have something; I do not exercise that power, and I give them more." It is also somewhat doubtful whether, after the power to give a fortune had, during the testator's life, been exercised in favour of the daughter, the antecedent power to appoint the fee to the son could be exercised. It certainly would no longer be so exercised as to prevent the term for 500 years from coming into operation. But, whether the testator could exercise the power or not, it is clear that it was not his intention to do so: and the *onus* lies on the plaintiff to show such an intention. Slight circumstances will not suffice: 1 Sugden on Powers, 370 (7th ed.).

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Malins, in reply:

The appointment of a portion under *the term of 500 years in favour of one daughter is not inconsistent with the exercise of the

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power, subject to that term and that portion. The term may be transposed.

LORD CAMPBELL, Ch. J.:

It has long been well settled that the donee in exercising a power must show an intention to exercise it, either by directly referring to the power or by referring to the subject-matter of it. In the present case there is no direct reference to the power; and I think there is no sufficient reference to the subject-matter. The testator uses these words: "all my real estate over which I have any disposing power I give" "to my eldest son" (the plaintiff), his heirs or assigns. He had, at the time he used those words, estates of his own, family estates coming from his own ancestors, and on which he resided; part of them were under settlement, and part were at his absolute disposal: and every word in this will is satisfied by supposing that he referred to those patrimonial estates over which he had complete disposing power, and not to the Pulestone estate over which he had a limited power of appointment. The reference to the subject-matter of a power must be unequivocal, to have the effect of making a devise be an execution of it. In the present case, if it were necessary, I should have no hesitation in saying that the will clearly showed an intention not to exercise the power. For it is clear that the testator intended to allow the term for 500 years to exist, and that the younger children should take the portions under it. It is, at least, highly improbable that he should under such circumstances intend to exercise a power antecedent to the term, and which, *primâ facie*, would seem, if exercised, [*258] to defeat the term: but it is clear that, if he had so intended, *he would not have used such expressions as these. He would not in one sentence include his fee simple estates which he had absolute power to dispose of, and the settled estates over which he had not the same kind of power, though he might appoint them, subject to a burthen, amongst a particular class. The words are not so applicable to the last kind of estate, as to the first. The cases cited establish principles which are not in controversy. They are instances of the application of those principles to particular circumstances. I apply them to the present case, and answer both questions in favour of the defendants.

PATTESON, J.:

I think the question really comes to this: Is there anything

which will satisfy the words used in Bryan Cooke's will so as to make it unnecessary to resort to the Pulestone estate as the subject-matter of the devise? I think there is amply enough for that purpose stated in the case. It is true that, applying the words "all my real estate over which I have any disposing power" to an estate of which he was seised in fee simple, the latter words are of very little use; but I think the testator did intend so to apply them. It would be quite a different thing if he had used the words "over which I have any disposing power under the will of Mrs. Mary Pulestone." As to that will itself: the provisions are by no means clear. The term for 500 years is to commence on the death of Bryan Cooke and Frances, in default of the exercise of the power of appointment among the sons, yet the very first trust of the term is to raise 10,000*l.* during the lives of these persons, and that by a term which is not to commence till after the death of the survivor. It is not easy to see how that was to be done. Be that however as it may: I have doubts *whether, after the trusts of this term had been partly executed by the appointment in favour of the daughter, the testator had any longer a disposing power under Mary Pulestone's will; but I am quite clear that he did not mean to exercise such a power if he had it. It is most improbable that he should intend to exercise a prior power after having partially exercised a subsequent one.

[*259]

ERLE, J. (1):

The plaintiff alleges that his father Bryan Cooke intended to exercise a power, which the father had under the will of Mary Pulestone, to appoint the Pulestone estates to the plaintiff in fee. The words which the father has used in his will are these, "All my real estate over which I have any disposing power I give, devise and bequeath to my eldest son," and his heirs. These words can in one sense be applied to the Pulestone estates: for Bryan Cooke was tenant for life of those estates under Mary Pulestone's will; so that they were, in one sense, his estate, and he had power to appoint how they should go amongst a particular class, viz. his sons, and had in one sense disposing power over them. But the words may also be explained as applicable to the Yorkshire estates, which were his own patrimonial inheritance, and over part of which he had disposing power, being owner in fee simple. I think that, giving to the words their ordinary sense, they show that he did not intend to exercise the power under the will. He might well call the Yorkshire estate

(1) Coleridge, J. was not in Court.

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"my" estate, as contradistinguished from the Welch estates which were his wife's; and, for the purpose of distinguishing the fee simple from the part which was settled, describe it as that over which he had disposing power; such I think

[*260]

*is the more obvious meaning of those words, which are not so applicable to the Pulestone estate over which he had power to appoint amongst a class, as to his own fee simple estate of which he might dispose as he pleased. And this construction I think is confirmed by the way in which he deals with the term of 500 years created by Mrs. Pulestone's will. That term was, under the provisions of the will, to come into effect in default of exercise of the power of appointment; and the trusts were for securing portions to the younger children. *Mr. Malins* argues that the testator intended to exercise the power of appointment subject to the term; but *Mr. Peacock*, in his very able argument, points out that the term had been brought into operation in his lifetime by his joining in fixing the portion of one child, a daughter, but the trusts as to the amount of the portions of the younger sons were left indefinite; and he argues that, if the testator had intended to exercise his power of appointment subject to the term, he would at all events have expressed his intention clearly, and said what portion each child was to take. It seems to me that, if he intended to exercise the power subject to the term, it is at least left in doubt what sum each of the younger sons was to take under the trusts of the term out of the estate. Construing the will the other way, it is clear, as each younger child takes 1,000*l.* under Mrs. Pulestone's will in default of an exercise of the power of appointment.

The COURT certified

That the term of 500 years, limited by the will of the said M. Pulestone, is a subsisting term. And that the plaintiff, P. D. Cooke, is tenant for life only of the hereditaments comprised in the second question.

1851. *June* 5.

ARMISTEAD *v.* WILDE.

(17 Q. B. 261—266; S. C. 20 L. J. Q. B. 524; 15 Jur. 1010.)

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Case by a guest against an innkeeper for loss of money in the inn. Plea: Not guilty. It was proved that the guest showed the money ostentatiously in the presence of several persons, and then openly put it in an ill secured box, which he left in the travellers' room; and from thence it was stolen. The Judge told the jury that gross negligence on the part of the guest would excuse the landlord, and left it to them to say "whether

there was gross negligence in leaving the money in the travellers' room." The jury found for the defendant:

Held, that, if the direction had been that the landlord of an inn was not answerable for the loss of money left in a public room, it would have been wrong: but that, taking the direction with reference to the facts in evidence, it must have been understood by the jury to mean that, if the guest was guilty of gross negligence conducing to the loss, the innkeeper was not responsible: and that the facts were evidence of such negligence conducing to the loss; and the direction right.

Quære, whether it is necessary to the innkeeper's defence, in such a case, that the negligence should be gross?

CASE against defendant as an innkeeper, for the loss of a parcel of money, brought by plaintiff's servant as a guest to defendant's inn, and there lost.

Pleas 1. Not guilty. 2. A traverse of the defendant's being innkeeper. Issues thereon. There were other issues which it is unnecessary to notice.

On the trial, before Platt, B., at the Liverpool Spring Assizes, 1851, there appeared strong evidence that the defendant acted as mistress of an inn at Liverpool, though there was nothing absolutely inconsistent with her being there merely as housekeeper. The plaintiff's brother, who was his traveller, had for many years frequented the inn: he came there, whilst defendant was acting as above, bringing with him a box, which he left at night in the travellers' room, as he had often done before. In the morning he found that the box had been forced open, and a parcel containing several hundred pounds in bank notes, the property of the plaintiff, had been stolen; and it was for this loss that the action was brought. It appeared on cross examination that the box was very imperfectly secured, and that the traveller had *boasted of the sum which he [*262] possessed, and had ostentatiously rolled up the notes and put them in the box in the travellers' room in the presence of several persons. There was strong ground to suspect that one of those to whom he thus showed the notes had been the thief. The learned Judge, in summing up, told the jury that gross negligence on the part of the guest would exonerate the innkeeper from liability; he commented on the facts, and directed the jury to find for the plaintiff on the issue of Not guilty, unless they thought the traveller "had been guilty of gross negligence in leaving the money in the travellers' room." No complaint was made of the way in which the other issues were left to the jury. The jury found on the first and second issues for the defendant, on the others for the plaintiff.

Wilkins, Serjt., in last Easter Term, obtained a rule *nisi* for a

ARMISTEAD v. WILDE.

new trial on the ground of misdirection, and also on the ground that the verdict on the second issue was against the evidence.

Knowles and *Crompton* now showed cause:

The Judge's direction on the first issue was correct. The defendant's case at the trial was that, though the innkeeper was *primâ facie* liable for the loss of the parcel, the plaintiff could not recover against the innkeeper for a loss induced by the misconduct of the guest, the plaintiff's servant. There was evidence that the guest, in the presence of many persons, wantonly made it obvious to them all that this large sum of money was placed in an ill secured box, left in a public room, in a populous town: and there was strong reason for believing that one particular person, to whom he thus showed the money, was the thief. The learned Judge stated, in [*263] *summing up, that an innkeeper was not bound by a loss occasioned by the guest's gross negligence; he then commented on this evidence; and he finally told the jury that they should find for the plaintiff on the plea of Not guilty, "unless they thought that the guest had been guilty of gross negligence in leaving the parcel in the travellers' room." It may be conceded that there would have been a misdirection if the learned Judge had told them that the guest by leaving the parcel in the travellers' room had taken it out of the landlord's custody: or even if he had led them to believe that it was the guest's duty to take the parcel to his bedroom, or take any particular care of it. But, when the direction is taken with the context, it means that leaving the parcel in the room under these circumstances was evidence from which they might infer gross negligence conducing to the loss: and, that an innkeeper is not liable for a loss so occasioned, was a right direction.

(The argument as to the weight of evidence on the second issue is omitted.)

John Henderson, in support of the rule:

The learned Judge gave the jury a false criterion as to what was negligence; he put the case to them as if the leaving of the box in the travellers' room was a breach of duty on the part of the guest.

LORD CAMPBELL, Ch. J.:

I am of opinion that the rule should be discharged. If the learned Judge had intimated to the jury that it was the guest's duty to withdraw the property from the travellers' room and

carry it with him to his bedroom, it would have been a misdirection: but such was not his direction. The *learned Judge reports that he finally left the question to the jury whether the guest was "guilty of gross negligence in leaving the parcel in the travellers' room:" that must be taken with reference to the circumstances of the case. Can it be contended that it is impossible in point of law for a guest under any circumstances to be guilty of negligence in leaving a parcel of money in the travellers' room? Suppose a guest were to count out his money and leave it lying loose on the table of the public room; surely that might be such gross negligence as to be the cause of the loss. The facts here do not go so far as that; but there was evidence that the plaintiff's servant, in a public room, took out a large sum of money, counted it and showed it, and then left it there in a box capable of being opened without using a key. These facts might or might not amount to negligence: but they were evidence of it; and it was a fair question for the jury. We do not lay down that goods left in the travellers' room in an inn are not in the care of the landlord, or that he is not responsible for their loss. Clearly he is *primâ facie* responsible. But there may be circumstances as to the nature and value of the property, the position of the room, or other things, which may make such conduct in the guest negligence conducing to the loss, and so rebut the landlord's *primâ facie* liability. There is no rule of law to make it so. It may in one case be gross negligence to leave property in the public room; in another it may be gross negligence to remove it thence to the guest's bedroom: each case must depend on its own circumstance. In the present case there was evidence to go to the jury of gross negligence on the plea of Not guilty; that issue was properly left to the jury: and the verdict *on that issue must stand. That being so, the question whether the verdict on the second issue was or was not according to the evidence becomes immaterial.

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[*265]

PATTESON, J.:

I take the law to be clear that the innkeeper is *primâ facie* liable for the loss of goods in his house, though they are left in the commercial room. There may be a difference where the innkeeper has warned the guest not to do so, and he persists in leaving them there. But in the present case there was no discussion between the guest and the innkeeper as to the place in which the parcel was to be left. The guest left it in the public room; and, if that had been

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all, the innkeeper would clearly have been liable for the loss. When the rule was granted, I had understood the Judge's direction to have been that the jury were to consider whether a prudent man would, of his own accord, have taken the parcel to the innkeeper and left it with him, or have taken it to his own room and locked it up, and that the jury were led to receive that as an exposition of what in the Judge's opinion would have been negligence. But it now appears that there were other circumstances in this case: and I agree that, although the landlord is *primâ facie* liable, his liability may be rebutted by proof of such negligence on the part of the guest as to lead to the loss. Whether such negligence exists must always be a question of fact. In the present case there were circumstances, such as the guest ostentatiously rolling up the notes and letting people see that he put them in an ill secured box, which were evidence that might justify a finding that there was such gross negligence as to lead to the loss; and the verdict on the first issue should not be disturbed. That being so, the second question is of no consequence.

[266] COLERIDGE, J.:

It cannot be disputed that there may be negligence on the part of the guest such as to relieve the landlord from his liability. The question is whether in the present case there was evidence of such negligence, and whether the proper guidance was given to the jury. If the learned Judge had put the case to the jury as if the fact of leaving the money in the travellers' room alone could have exonerated the landlord, he would have been wrong: but his direction must be taken with reference to the circumstances on which he had just commented. There was evidence that the guest ostentatiously showed the money, and allowed it to be seen that he left it in an insufficient box. There was a case which might properly go to the jury; for there was evidence of facts which might make it negligence on the part of the guest to leave the money there.

ERLE, J. concurred.

LORD CAMPBELL, Ch. J. added:

The learned Judge reports that he left it to the jury to say whether there was "gross" negligence on the part of the guest. I doubt whether that direction was not too favourable to the

plaintiff (1). I give no opinion on this point, which does not arise: but it is not to be taken that we have decided that negligence on the part of the guest conducing to the loss will not exonerate the landlord unless it amount to *crassa negligentia*.

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Rule discharged.

EATON *v.* THE SWANSEA WATERWORKS COMPANY (2).

1851. *June* 5.

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(17 Q. B. 267—276; S. C. 20 L. J. Q. B. 482; 15 Jur. 675.)

Case for disturbing a watercourse which of right ought to flow into plaintiff's close to irrigate it. Plea: denial of the right. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years, past plaintiff's close. There was evidence that during that period plaintiff, and those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, and that the owners of the watercourse resisted it. On one occasion, when plaintiff's servant drew off the water, e was summoned before a justice for so doing; plaintiff's son by his direction attended and defended the servant, and paid a fine of 1*s*. The conviction was under a local Act, from which there was a power of appeal. Plaintiff did not appeal.

The conviction was tendered in evidence, and rejected. In summing up, the Judge explained that the enjoyment to defeat an adverse right must be for twenty years, without interruption acquiesced in for a year. One of the jury asked what would be the effect in law of a state of perpetual warfare between the parties? which question the Judge did not answer. The jury found that "the watercourse had been enjoyed as of right for twenty years, and without interruption for a year," and were directed to find for plaintiff:

Held that the evidence was improperly rejected, as the conviction, unappealed against, was, under the circumstances, evidence of an acknowledgment by the plaintiff, that the usage, to draw off the water for irrigation, was not as of right:

Held also that interruptions, though not acquiesced in for a year, might show that the enjoyment never was of right, but contentious throughout; though, if once the enjoyment as of right had begun, no interruption for less than a year could defeat it: and consequently that the manner in which the question was left, and the verdict found, was not satisfactory; and a new trial was granted.

CASE. The first count stated that plaintiff was possessed of a close called the Home Field, and by reason thereof "ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which had been used to run and flow, and during all that time of right ought to have run and flowed, and, until the time of

(1) See *Cashill* v. *Wright* (1856) 6 E. & B. 891.—A. C.

(2) Cited, *Dalton* v. *Angus* (1881) 6 App. Cas. 786, 50 L. J. Q. B. 689; *Hollins* v. *Verney* (1884) 13 Q. B. D. 307, 53 L. J. Q. B. 430.—A. C.

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the diversion hereinafter complained of, did run and flow, and still of right ought to run and flow, into the said close" for irrigating the same; which the defendants diverted.

Plea to 1st count: That plaintiff "by reason of his possession of
[*268] the said close ought not of right to have *had or enjoyed, nor ought he still of right to have or enjoy, the benefit or advantage of the water of the said stream or watercourse in that count mentioned, nor had the said stream or watercourse been used to run" &c., "nor ought the same at the time when" &c., "of right to have run" &c., "or ought the same to run," "unto or into the said close," *modo et formâ*. On which issue was joined.

There were two other counts claiming the stream in respect of the Flat Field, and the Clover Field, on which the pleadings were similar.

On the trial, before Williams, J., at the last Glamorganshire Spring Assizes, it appeared that stat. 7 Will. IV. & 1 Vict. c. lii. (1) incorporated the promoters of the Act by the name of "The Swansea Waterworks Company," and authorized them, among other things, to make waterworks, and for that purpose to purchase from the owners, by their consent, two mills, called Upper Bryn Mill and Lower Bryn Mill, and the ponds and reservoirs of those mills, and the enjoyment of the water of the brooks and streams flowing into those ponds, and, under certain restrictions not material to the present case, to divert those waters into the Company's waterworks. By sect. 82 it is enacted that, if any person shall (amongst other things specified) "wilfully flush or draw off, or cause to be flushed or drawn off, the water from any parts of the said waterworks," "every person so offending shall forfeit and pay to the said Company for every such offence any sum not exceeding 10*l*." By sect. 93 such penalties are to be recovered before a justice of
[*269] the *peace. And sect. 99 gives an appeal to the Quarter Sessions. The Company in 1839 purchased from the owners the two mills and mill ponds, and the water belonging to them. Under this purchase they diverted into their waterworks a stream called Cwm Donkin. The present action was brought, by order of BRUCE, V.-C., to try the right as between them and the plaintiff to that watercourse.

The stream called Cwm Donkin took its origin above the plaintiff's land; it skirted the plaintiff's three closes, separated

(1) Local and personal, public. "For better supplying with water the town and borough of Swansea in the county of Glamorgan."

from them only by a wall, and then, below the plaintiff's land, flowed into what had been the Upper Bryn Mill pond, and was now the Company's reservoir. The diversion complained of was a recent alteration in the course of the Cwm Donkin, above the plaintiff's land, made for the purpose of forming a new reservoir for the Company. The plaintiff, at first, relied on his right to the use of the stream by immemorial prescription: the evidence was conflicting: but on the whole it appeared that, about thirty years before 1st February, 1851, on which day the action was commenced, a new channel had been dug for the Cwm Donkin, and that from that time it had flowed in its present course, which was not therefore ancient. The plaintiff then rested his case on twenty years' enjoyment under the Prescription Act (2 & 3 Will. IV. c. 71). There was a great body of evidence, on both sides. The plaintiff gave evidence from which the jury might fairly have inferred that the plaintiff, and those under whom he claimed, had been, for twenty years and more, in the habit from time to time of making a trench through a hole in the wall and so drawing off the water to irrigate the three fields in question. There was also evidence *from which it might be inferred that the occupants of the Upper [*270] Bryn Mill had (up to the time when the mill was conveyed to the defendants in 1839) been in the habit of stopping up this trench whenever it was made; and that the defendants, since they had acquired the mill, had pursued the same course. A witness for the defendants, named Luke, proved that on one occasion, in 1840, after the defendants had turned the stream into their works below the plaintiff's land, the defendants had closed the trench, and he as a servant of the plaintiff, by his order, opened it and drew off the water; that he had been summoned before a justice in consequence; and that the plaintiff's son, by the plaintiff's direction, went with Luke before the justice, defended him, and ultimately paid a shilling; and there was no appeal. A conviction of Luke before that justice for wilfully drawing off water from the Company's waterworks, under stat. 7 Will. IV. & 1 Vict. c. lii. s. 82 (above set out), was tendered in evidence by the defendants, and rejected. In the course of the summing up, the learned Judge stated to the jury that one question was as to the enjoyment as of right for twenty years. He explained that to defeat a right an interruption must be acquiesced in for a year. A juryman asked, What would be the law, if there had been during more than twenty years a perpetual state of warfare between the parties? The learned Judge said

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that, if they thought such the fact, they should say so, and then he would give his direction. In the end he put to the jury questions in writing as to each count; to which the jury gave written answers.

The questions and answers on which the discussion in banc arose were as follows:

[*271] 1. Has the Cwm Donkin Brook flowed through a part *of the Home Field as an ancient natural watercourse enjoyed for the purpose of irrigating and watering the same, and the more convenient occupation thereof? Answer. No.

2. Have the occupiers of the Home Field enjoyed as of right for twenty years up to February 1st, 1851, a watercourse running through that field for the purpose of irrigating and watering the same and the more convenient occupation thereof? Answer. Yes; and without interruption for a year.

There were similar questions and answers as to the Flat Field and the Clover Field. The learned Judge directed a verdict for the plaintiff.

Evans, in the ensuing Term, obtained a rule *nisi* for a new trial, on the ground of misdirection, and of the improper rejection of evidence. He contended that the learned Judge's summing up had the effect of leading the jury to suppose that, if the water was taken by the plaintiff at intervals during twenty years, it was immaterial whether the enjoyment was of right, or secretly or forcibly, provided the intervals at which it was taken were less than a year. He said that what the juryman called the "perpetual warfare" between the parties was a fact proper to be left to the jury as tending to show that the water was not taken as of right; and that the conviction was material evidence for the same purpose. The rule was also obtained upon affidavits.

Grove and *Bovill* now showed cause:

There was no misdirection. No interruption not acquiesced in for a year can operate as an interruption: *Flight* v. *Thomas* (1).

[272] (ERLE, J.: I was counsel for the successful party in that case; and the judgment was affirmed in the House of Lords: yet I always thought it a strange decision. The effect of it was that, where there had been an enjoyment of light for nineteen years and

(1) 52 R. R. 468 (11 Ad. & El. 688). Judgment of Ex. Ch. affirmed in Dom. Proc., 52 R. R. 478 (8 Cl. & Fin. 231).

a fraction, and then an interruption acquiesced in for the remaining fraction of a year, during which there was no enjoyment, the two together made up twenty years' enjoyment.)

The decision proceeded upon the words of the statute, and is precisely in point.

(LORD CAMPBELL, Ch. J.: The decision in *Flight* v. *Thomas* (1) may establish conclusively that, when an easement has once been enjoyed as of right, such enjoyment must be taken, for the purposes of the Act, to continue though interrupted, unless the interruption be acquiesced in for a year. But I do not think any member of this Court is inclined to go beyond that decision.)

Then, the conviction was not evidence, and was properly rejected. It was an adjudication of a justice on a collateral question, and could not be evidence against the plaintiff. The facts, as to what took place before the justice, were admitted; and even if the conviction had been improperly rejected it could have made no difference.

Evans, *Willes* and *Benson* were not called upon to support the rule.

LORD CAMPBELL, Ch. J.:

There must be a new trial on the ground of the improper rejection of evidence. It seems to me that, although the conviction was not evidence *per se*, or admissible as an adjudication by the justice, it was, not only admissible, but very material, when connected with the facts which preceded and followed the conviction, which it explains so as to make them very important evidence on the question whether there was an enjoyment as of right. [*273]

It appears that Luke, the plaintiff's servant, did an act by his command; he was summoned before a justice; the plaintiff's son went with him before the justice and, as the plaintiff's agent, paid the fine imposed; and there was no appeal. The conviction, if admitted, would have shown that the act for which Luke was fined was drawing off the water. If he had by the plaintiff's order drawn off the water, and the plaintiff had a right to draw it off, he would have done no more than was lawful, and the conviction would have been wrong. The plaintiff, who knew this, and knew

(1) 52 R. R. 463, 478 (1 Ad. & El. 688; 8 Cl. & Fin. 231).

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he might appeal, did not do so. That acquiescence of the plaintiff in the conviction must be evidence, as an acknowledgment that he did not enjoy as of right. Its weight may be great or small; but it should not have been excluded: and certainly it is not so small as to enable us to say that it could not affect the verdict.

I have the less regret in sending down the cause for a new trial on this ground, because I am not convinced that the verdict was satisfactorily obtained. The jury answer the question put by the learned Judge in these terms: "Yes; and without interruption for a year." The answer is a sort of negative pregnant; and, when coupled with what passed before, it leads me to suspect that the jury may have thought that there was a perpetual warfare, and that, though the easement was claimed as of right, the enjoyment [*274] was not as of right *but contentious. Now, though it may be that an interruption must be acquiesced in for a full year before it breaks the period, where the subject-matter has previously to the interruption been enjoyed as of right, interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment of right. Such interruptions are explanatory of what the user really was. I think it would be a monstrous state of law if this were not so.

PATTESON, J.:

This conviction was of the plaintiff's servant for an act done by the plaintiff's command; he knew of the summons, and sent his son to attend; and the son paid the fine, and did not appeal. It is all one as if the plaintiff himself had been convicted, and paid the fine; and it was clearly evidence, for the reasons my Lord has pointed out.

As to the more important question. This is a claim to an easement under stat. 2 & 3 Will. IV. c. 71, s. 2: *Flight* v. *Thomas* (1) was under sect. 3. The words of sect. 2, "enjoyed by any person claiming right thereto without interruption for the full period of twenty years," must be understood to have the same meaning as the words used in sect. 5, where it is enacted that in pleading it shall be sufficient to allege "the enjoyment thereof as of right." In the present case the Judge does not give the jury any specific

(1) 52 R.R. 468, 478 (11 Ad. & El. 688; 8 Cl. & Fin. 231); see per MAULE, J., 52 R. R. 473 (11 Ad. & El. p. 695). See also *The Mayor &c. of London* v. *The Master, Wardens &c. of the Pewterers Company*, 62 R. R. 816 (2 Moo. & Rob. 409).

guidance as to what enjoyment "as of right" is: and their answer to the question actually put is a little ambiguous. The question ought to *have been shaped more distinctly; for there were many pieces of evidence in this case (in addition to the conviction which was rejected) which were proper for the consideration of the jury on the question whether the enjoyment was of right. [*275]

COLERIDGE, J.:

I am of the same opinion. I think that on a question of this kind it is most important to show what was the nature of the user, and of the interruptions, as bearing on the question whether the enjoyment was as of right. For, though no interruption for less than a year breaks the period when once the enjoyment as of right has begun, yet interruptions acquiesced in for less than a year may show that the enjoyment never was of right.

ERLE, J.:

The plaintiff claims a right to water from twenty years enjoyment, under stat. 2 & 3 Will. IV. c. 71. The defendant had, from time to time, prevented him from exercising the easement claimed. The question was left to the jury, Had the plaintiff "enjoyed as of right?" These words "of right" occur in sect. 5 of stat. 2 & 3 Will. IV. c. 71; and there has been much difficulty as to their construction: but it seems clear that, if the enjoyment is clandestine, contentious or by sufferance, it is not of right. Enjoyment as of right must be "*nec clam, nec vi, nec precario*" (1). It seems to me that the piece of evidence rejected was most material on the question whether the user in the present *case was an enjoyment of this nature. [*276] The plaintiff drew off the water; it was an act of user of the very easement now claimed; then what does the defendant? He attacks and convicts and fines the plaintiff, who acquiesces and pays the fine: I say the plaintiff, for Luke and the plaintiff's son are identified with him. I think the conviction, which was the proper evidence of this, was most material on the question whether the user was "of right." For the rest I need only say I agree entirely with my LORD CHIEF JUSTICE.

Rule absolute.

(1) Sane enim et in servitutibus hoc idem sequimur, ut, ubi servitus non invenitur imposita, qui diu usus est servitute neque vi, neque precario, neque clam, habuisse longa consuetudine, vel jure impositam servitudinem videatur. . . . eritque ista quasi servitus. Dig. lib. 39, tit. 3, De aqua, l. 1, sec. 23. See also Gale on Easements (2nd ed.), p. 123.

1851.
June 3, 6.

[281]

SIMS AND ANOTHER *v.* MARRYAT (1).

(17 Q. B. 281—294; S. C. 20 L. J. Q. B. 454.)

Defendant, executor of a deceased author, M., wrote to plaintiff, a publisher, referring to a previous offer from plaintiff to defendant to give 50*l.* for the copyright of one of M.'s works called "V.," which defendant said he had accepted. Defendant then added: "I possess but few of the copyrights of the earlier portion of M.'s works:" "I will let you know in a few days those of the works that belong to me that I feel disposed to offer" you: "in the mean time I shall be glad to know if you received my last letter accepting your offer for 'V.,' and, if not, whether you still hold the same proposal." Plaintiff paid defendant 50*l.*, and had from him a receipt in these terms: "Received from S." (the plaintiff) "50*l.* for permission to publish M.'s work, 'V.,' so long as the copyright may endure. The right to be exclusively" S.'s "own for ten years from this date." M. in his lifetime had agreed with B., another publisher, to sell him the copyright of "V." No transfer had been executed; and the agreement between M. and B., which was in writing, was unattested. This was unknown to defendant and to plaintiff. B. opposed the publishing of the work by plaintiff, who then brought an action against defendant on a warranty of title in the copyright:

Held, that there was in this case an express warranty of title contained in the letter and receipt. *Quære*, whether on the sale of such a commodity as a copyright the law would imply a warranty of title?

Held, also, that B. had an equitable title to the copyright.

The Court takes judicial notice of the law of England as administered in the courts of equity.

ASSUMPSIT. The declaration recited that the plaintiffs were the proprietors of a literary periodical, called "The Parlour Library," and were desirous of publishing therein a work whereof one Frederick Marryat, then deceased, was the author; and that the defendant was the son and executor of the said F. Marryat. It then stated that, in consideration that plaintiffs would pay defendant 50*l.*, for licence and permission to publish the said work of F. M. in the said literary periodical, defendant promised plaintiffs that he, defendant, then had sufficient right, title and authority, at law and in equity, to sell and grant such licence and permission. Averment that plaintiffs paid the said sum of 50*l.* Breach: that defendant at the time of the said contract had not such right, &c. as aforesaid, but that, on the contrary thereof, at the time of the making of the said contract, one Richard Bentley was equitably the proprietor of the copyright of the said book or work, and had the sole right, title and authority to grant

[*282] such *license and permission to publish the said book or work. Allegation of special damage.

Pleas: 1. *Non assumpsit.* 2. That defendant had such sufficient right, title and authority, in accordance with his said contract, as

(1) Cited, *Dorab Ally Khan* v. *Abdool Azeez* (1878) L. R. 5 Ind. App. 126; see now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12.—A. C.

alleged in the declaration. 3. That Bentley was not equitably the proprietor of the said copyright, nor had he the sole right &c. to grant such licence or permission as alleged in the declaration. Issues thereon.

On the trial, before Lord Campbell, Ch. J., at the Middlesex sittings after last Michaelmas Term, a verdict was found by consent for the plaintiffs, for 425*l.* damages and 40*s.* costs, subject to the opinion of this Court on the following case.

The plaintiffs in this cause are booksellers and publishers at Belfast; the defendant is the son, heir-at-law and sole executor of the late Captain Frederick Marryat, who was the author, among other books and works, of that mentioned in the declaration, called "The Adventures of Monsieur Violet," which was first published in or about 1849. Captain Marryat died on 9th August, 1848, having on 14th March, 1848, duly made and published his will, whereby he gave and devised all his real estates and personal estate whatsoever and wheresoever (with certain exceptions not including the copyright of any of his books or works) to the defendant, his heirs, executors, administrators and assigns, absolutely and for ever. The defendant proved the will on 25th October, 1848.

The plaintiffs are the proprietors of a periodical work called "The Parlour Library," which is published in monthly volumes, each usually containing some popular work of fiction. In February, 1849, the plaintiffs were *desirous to publish in "The Parlour Library" [*283] "The Adventures of Monsieur Violet," and communicated the fact to the defendant by letter; but the plaintiffs are unable to adduce legal evidence of the terms thereof. On 1st March, 1849, the defendant in reply wrote and sent to the plaintiffs the following letter. "GENTLEMEN,—I shall be very happy to treat with you respecting the copyright of 'Monsieur Violet.' Yours very truly, FRANK MARRYAT." On 23rd August, in the same year, the defendant again wrote and sent to the plaintiffs the following letter. "GENTLEMEN, —You formerly made me an offer of fifty guineas for the exclusive right of publishing in your 'Parlour Library' for ten years Captain Marryat's work 'Monsieur Violet,' which offer I accepted, and wrote to you to that effect: I possess but few of the copyrights of the earlier portion of Captain Marryat's works; and they are many of them already published in a cheap edition: I will let you know in a few days those of the works that belong to me that I feel disposed to offer for your 'Parlour Library;' in the mean time I shall be glad to know if you received my last letter accepting your offer for

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'Monsieur Violet,' and, if not, whether you still hold the same proposal. I remain" &c. "FRANK MARRYAT." "I perceive on reference to your letter that fifty pounds was the sum offered." The plaintiffs thereupon paid to the defendant the sum of 50*l.*; and the defendant gave them the following receipt: "LANGHAM, August 25th, 1849,—Received from Messrs. Sims and McIntyre fifty pounds sterling for permission to publish Captain Marryat's work, 'The Travels of Monsieur Violet,' so long as the copyright may endure: that right to be exclusively their own for ten years from this date.
[*284] FRANK S. MARRYAT." *Immediately after the payment of the 50*l.*, the plaintiffs took proceedings to prepare the said work for the press so as to form the November volume of "The Parlour Library." The case did not state the particular expenses incurred by them, as it was agreed that, if the Court should be of opinion that the plaintiffs were entitled to recover, the verdict for 425*l.* was to stand.

In the month of September, after the plaintiffs had made very considerable progress in their said proceedings, and had advertised "The Adventures of Monsieur Violet" as being one of the intended volumes of "The Parlour Library," they received a notice from Mr. Bentley forbidding them to proceed with the publication, and claiming to be entitled to the copyright of the work. A correspondence ensued between the parties, which resulted in Mr. Bentley persisting in his claim; and the plaintiffs abandoned their intention of publishing the book. It was made to appear to them, as the fact was, that, prior to the 29th May, 1846, a negotiation took place between the late Captain Marryat and the said Richard Bentley touching the subject-matter of the instrument hereinafter next mentioned, which resulted in the following instrument being signed by the late Captain Marryat, and delivered by him to the said R. Bentley.

"Memorandum of agreement, made the 29th day of May, 1846, between Captain Marryat, R.N., C.B., and of Langham, Norfolk, on the one part, and Richard Bentley, of New Burlington Street, publisher, on the other part. The said Captain Marryat hereby agrees to assign over all the remaining copyright of and in the eight under mentioned works written by the said Captain
[*285] Marryat (the said copyright being at this *present time his exclusive property to use as he may think proper) to the said R. Bentley: The eight works thus to be assigned are as follows: 1. 'The Phantom Ship.' 2. 'The Poacher.' 3. 'The Dog Fiend.' 4. 'Percival Keane.' 5. 'Olla Podrida.' 6. 'Diary in America.' 7. 'Diary in

America,' second part. 8. 'Monsieur Violet's Adventures.' Each and all of which works, the previous editions being sold off, are available to be used in any manner the said R. Bentley may choose, with the exception of 'The Phantom Ship,' which will be available at the expiration of seven years from first publication. And the said R. Bentley agrees to purchase all the remaining copyright and author's interest in the aforesaid works at and for the sum of 300*l.*; to be paid to the said Captain Marryat in his the said R. Bentley's promissory notes at six and nine months, for 150*l.* respectively, on the execution of the present memorandum of agreement. A deed of assignment of the said copyright by the said Captain Marryat to the said R. Bentley (such assignment to be at the expense of the said R. Bentley) to be executed within the ensuing month of June." Signed "FREDERICK MARRYAT."

The said R. Bentley accepted the said instrument from the said Captain M., and assented thereto, and gave to the said Captain M. the said promissory notes, which were paid at maturity. Although the said instrument was stamped as an agreement at the time of the trial of this action, yet it was not stamped when it was signed by the said Captain M., nor was his signature attested. The said instrument was not sealed by Captain M. Counsel of eminence at the Equity Bar were prepared to prove at the trial of this cause that, in their opinion, although the last mentioned agreement was not attested so as to vest the legal right to the copyright in the said [*286] R. Bentley, yet a court of equity would have decreed Captain M. in his lifetime, or his representative after his death, specifically to perform that agreement, and to concur in an entry at Stationers' Hall so as to have given the said R. Bentley a clear legal title to the copyrights of the works mentioned in the agreement.

The work mentioned in the above instrument called "Monsieur Violet's Adventures" is the same work as "The Adventures of Monsieur Violet" mentioned in the declaration. The plaintiffs do not impute to the defendant that he was aware of the existence of the above instrument at the time of the receipt of the said 50*l.* from the plaintiffs. No entry of the said instrument, nor any reference to the same, has at any time been entered in the Book of Registry mentioned and referred to in sects. 11 and 13 of stat. 5 & 6 Vict. c. 45; nor has any entry been made in the said Book of Registry of any assignment to the said R. Bentley, or any other person, of the copyright of the said work called "The Adventures of Monsieur Violet;" nor is such a copyright in any way referred to in

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such Book of Registry; nor are the plaintiffs' names in any way mentioned or referred to in the said book in connection with the said copyright, as having licence or permission to publish the said work, or otherwise. The defendant denies that he gave any such warranty as that alleged in the declaration. The plaintiffs, however, contend that the foregoing facts sufficiently prove such warranty. The defendant also contends that he has also a good defence to this action on the second and third pleas.

The Court was to have power to draw any inference of fact which [*287] a jury might have drawn; also to order *any amendment of the pleadings which the Lord Chief Justice might have ordered at Nisi Prius. A copy of the pleadings accompanied, and was to be deemed part of, the case. If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand; if the Court should be of a contrary opinion, a nonsuit to be entered.

The case was argued in this Term: June 3rd (1) and 6th (2).

Hugh Hill, for the plaintiffs:

The questions that arise are distinct; first, whether the defendant gave a warranty of title to the copyright; secondly, whether Bentley had the equitable interest in the copyright.

As to the first question: a warranty of title is implied by law on such a sale as this: but, further, there was in the present case an express warranty. There are no cases as to the extent to which the law implies a warranty of title on a sale either of a copyright or of a licence to print a book: the case must be decided by its analogy to others. It is clear that on a sale of real estate the vendor contracts to make a good title. It is true that, when the conveyance is actually executed, there is no covenant beyond what may be expressed in the deed; for *expressum facit cessare tacitum*; and so it may be that, if, in the present case, a transfer of the copyright under seal had been executed, the plaintiffs must have relied on the covenants in that transfer: but the contract here remained executory. So in sales of personal property, where the [*288] property passes, there is, according to *the reasoning of the Court of Exchequer in *Morley* v. *Attenborough* (3), warranty of title implied by the mere sale; but in the judgment in that case (4) a distinction

(1) Before Lord Campbell, Ch. J., Patteson and Erle, JJ.; Coleridge, J., was at Guildhall.

(2) Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

(3) 77 R. R. 709 (3 Ex. 500). See *Chapman* v. *Speller*, 80 R. R. 342 (14 Q. B. 621).

(4) 77 R. R. 711 (3 Ex. 509).

is made where the contract is executory. The principle of that distinction prevails in sales of shares in public Companies: *Hibblewhite* v. *McMorine* (1), *Shaw* v. *Rowley* (2).

(PATTESON, J.: Those are not bargains for the sale of specific things; the vendor is to supply shares; and it is quite immaterial to the purchaser which specific shares are supplied.)

The contract here is not executory in the sense that the thing to be transferred was unascertained; but it is executory in so far that a subsequent conveyance was necessary to pass the copyright. But, in the present case, the bargain is contained in written documents; and on the fair construction of these the defendant expressly warrants the title.

The second question is one of equity.

(LORD CAMPBELL, Ch. J.: It was a mistake to propose adducing evidence as to the doctrines of equity. Equity is not a foreign law to be proved by evidence, but part of the law of this realm of which the Judges take judicial notice, and which is to be established by argument, and by citing authorities. It is different as to the practice in equity.)

A court of equity would, in this case, have decreed a specific performance in favour of Bentley, on the ground that the contract was for the sale of the particular copyright, for the breach of which contract the remedy at law was inadequate: *Adderly* v. *Dixon* (3). And, had the plaintiffs proceeded to publish the work, Bentley *might have obtained an injunction to prevent them: *Sweet* v. *Cater* (4). [*289]

Channell, Serjt., *contrà*:

This is not an action for money had and received to recover the price paid for the right supposed to be sold to the plaintiffs, but an action for large damages consequential on the breach of an alleged warranty of title. The warranty declared on is that the defendant had a good title both at law and in equity: is such a warranty implied or proved? It is not quite clear whether the contract was to sell the copyright, or merely to give a licence to print. Either way, it is for the sale of a specific thing; and, according to *Morley* v. *Attenborough* (5), no warranty of title is by the law of England

(1) 56 R. R. 578 (6 M. & W. 200).
(2) 73 R. R. 726 (16 M. & W. 810).
(3) 24 R. R. 254 (1 Sim. & St. 607).
(4) 54 R. R. 439 (11 Sim. 572).
(5) 77 R. R. 709 (3 Ex. 500).

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implied merely on the sale of a specific thing. The distinctions made in the judgment of the Court of Exchequer in that case do not affect the defendant. Where a contract is to supply things of a particular description which the vendor is to select, there is good reason why the vendor should be held to warrant the title; and the Court of Exchequer refer to contracts executory in that sense. Again, where a chattel is exhibited for sale under such circumstances as amount to an assertion that the vendor will give a title, as in a retail shop, a warranty may be inferred. But in the present case the defendant was an executor; as such he had those incorporeal rights which his testator had not disposed of; and he sold the copyright as a copyright of his testator; his position was exactly analogous to that of the pawnbroker who sold the harp as an unredeemed pledge: *Morley* v. *Attenborough* (1). Had a specific

[*290] performance *been decreed, the court of equity would not have ordered the defendant to covenant for title absolutely, but to covenant as an executor usually does, against his own acts and omissions only. To that extent he may well be held to warrant the title: but neither by express words nor by implication does he warrant further: *Peto* v. *Blades* (2).

Then as to Bentley's right. Had he gone into equity, the defendant, who had the legal title, must have been made a party; and he might have urged that Bentley in not giving him notice of the assignment had been guilty of *laches*. That would not have barred Bentley from equitable relief; but it would have been made a condition that he should do equity by indemnifying the defendant against the consequences of his *laches*. At all events the last issue should be found for the defendant, as it is clear that Bentley had not the legal title, and consequently had not "the sole right, title and authority to grant such licence and permission."

(LORD CAMPBELL, Ch. J.: The whole plea must be taken together: and then it is clear that the averment means sole right as equitable assignee.)

Hugh Hill was not called upon to reply.

LORD CAMPBELL, Ch. J.:

I am clearly of opinion that the plaintiffs are entitled to the judgment of the COURT. I do not think it necessary to enquire what the law would be in the absence of an express warranty. On

(1) 77 R. R. 709 (3 Ex. 500). (2) 15 R. R. 609 (5 Taunt. 657).

that point the law is not in a satisfactory state. The decision in *Morley* v. *Attenborough* (1) was that a pawnbroker, *selling an unredeemed pledge as such, did not warrant the title of the pawnor. [*291] Of that decision I approve: but a great many questions, beyond the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying that, on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply: but if so there are many exceptions stated in the judgment which well nigh eat up the rule. Executory contracts are said to be excepted; so are sales in retail shops, or where there is a usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply. But in the present case we have the documents before us to which we must look for the contract. We are to look, not at the preliminary negotiations, but at the final contract, which is proved by the correspondence, and in the receipt. And, doing so, I cannot have any doubt that the defendant, in ignorance of what his father had done, and without the smallest blame attaching to him, and really believing that the title to this copyright was in him, did warrant that it was in him, and did warrant this to the plaintiffs as purchasers of the copyright from him. The first letter set out in the case offers to treat with the plaintiffs respecting "the copyright of 'Monsieur Violet.'" The copyright of a work is the exclusive right to multiply copies of a work, not merely a right to do so in common with others. The answer to that letter is not given; but there is a second letter in which the defendant writes: "You formerly made me an offer of fifty guineas for the exclusive right of publishing in your 'Parlour Library' for ten years Captain Marryat's work 'Monsieur Violet,' *which offer I accepted, and wrote to you to that [*292] effect." Here is an acknowledgment of a contract whereby the defendant sold "the exclusive right of publishing." How could he do so unless he had it? Is not this an affirmation that the copyright of "Monsieur Violet" did belong to him, and to him only, and that he had sold that right? If we were confined to the words of the receipt alone, I think they would of themselves amount to an express promise that the plaintiffs were to have the exclusive right so long as the copyright should endure; and is not that promise broken if the defendant had not the exclusive right to give them? It appears therefore to me that in this case there was an express

(1) 77 R. R. 709 (3 Ex. 500).

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warranty, and that we are relieved from considering the more general question.

As to the other points. I have no doubt that the Judges of a common law Court take judicial notice, not only of the doctrines of equity, but of those of every branch of English law, when they incidentally come before them. When a question of ecclesiastical law arose, it used to be the practice to move for two Doctors. Those learned persons when they came were treated with great respect; but they came as advocates to argue the law, not as witnesses to state it. It has sometimes been said that we know nothing of Parliamentary law: but, if a question of Parliamentary law does come before us incidentally in a matter over which we have jurisdiction, we must decide it, and must inform ourselves as we best can. So in a question of equity. If we do not know the question of equity, we are supposed to have the means of learning it. In the present case I have no doubt that Bentley had the equitable interest in the
[*293] copyright, and that, if the plaintiffs had not obeyed *his notice, he would have obtained an injunction: *Sweet* v. *Cater* (1).

PATTESON, J.:

I agree with my Lord in thinking that the general doctrine as to implied warranty of title on contracts for the sale of personal property, whether executory or not, does not arise in this case, as we cannot but see that there was an express warranty between the parties. In many of the earlier cases the question is whether an affirmation was a warranty. Lord HOLT, in *Medina* v. *Stoughton* (2), says that, "where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty." Much more is this the case if he affirms that he has the right to convey the exclusive title to it. We cannot take the receipt as the only evidence of the contract, but must look at the correspondence also. Now I think the second letter set out shows very strongly that the defendant meant to say that "Monsieur Violet" was one of the works which he there mentions, one of the works of his late father, of which the copyright belonged to him. Coupling that letter with the receipt, I think there is an express warranty, making it unnecessary to consider the somewhat nice and minute points which were discussed in the judgment in *Morley* v. *Attenborough* (3).

As to the other point, *Sweet* v. *Cater* (1) is decisive that there was

(1) 54 R. R. 439 (11 Sim. 572).
(2) 1 Salk. 210; *S. C.* 1 Ld. Ray. 593.
(3) 77 R. R. 709 (3 Ex. 500).

an equitable assignment to Bentley; and the averment in the plea is confined to an equitable right. There are cases in which a right to recover the price as money had and received on a consideration which has failed would be a sufficient remedy; but the *present is a case in which the special damage from the breach of warranty is considerable.

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COLERIDGE, J.:

I did not hear the whole argument: but, upon so much as I heard, I agree with what has been said.

ERLE, J. concurred.

Judgment for plaintiffs.

WILTON *v.* DUNN.

1851. *June* 6.

(17 Q. B. 294—302; S. C. 21 L. J. Q. B. 60; 15 Jur. 1104)

[294]

Use and occupation. Plea: that the occupation of the premises was by the leave of plaintiff who was mortgagor in possession: that, after such occupation, the mortgagee, who was entitled to the land during the whole period of occupation, gave notice to defendant, claiming the mesne profits: that defendant until such notice was ready and willing to pay plaintiff; and that, from the time of such notice, he was liable to pay the mortgagee:

Held, no defence at law. *Quære*, whether actual payment to the mortgagee under pressure of this claim would have been a defence.

ASSUMPSIT by the executor of Mary Stinton. 1st count for use and occupation of certain premises, and undivided shares of premises, in the time of the testatrix. 2nd count on an account stated with the testatrix. 3rd count on an account stated with the executor.

Plea, as to 100*l.* parcel of the moneys in the 1st count, 100*l.* parcel of the moneys in the 2nd count, and 100*l.* parcel of the moneys in the 3rd count, that Mary Stinton was seised in her demesne as of fee tail of and in the premises in the first count mentioned, and, being so seised, by indenture enrolled, conveyed them to the use of William John Holt and Henry Wilton the younger, their executors and assigns, for the term of ninety-nine *years, upon trust, at the request of Mary Stinton, to raise a sum [*295]
of money by mortgage; and, subject to the mortgage term, to uses over; whereby Holt and Wilton by virtue of the statutes became possessed of the premises for the term of ninety-nine years. The plea then showed an assignment by Holt and Wilton of the residue of the term of ninety-nine years to Louisa Smith, by indenture, by way of mortgage, to secure the sum of 200*l.*, with the common proviso that if the 200*l.* was paid within six months the assignment

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should be void. Averments that the six months elapsed, and that the 200*l.* was not paid and still continued unpaid. The plea then proceeded to aver that the said Louisa Smith did not, nor did any assign or assigns of L. Smith, enter upon or take possession of the said undivided parts and shares at any time before the commencement of this suit; but, from the time of the making the last-mentioned indenture until the defendant became indebted to the said Mary Stinton in the said first mentioned parcel, the said M. S., as mortgagor in possession but not otherwise, had the controul, management and disposition of the same undivided parts and shares: that, while the said M. S. had such controul, management &c., and while the said M. S. had no other title to the same than as such mortgagor in possession, defendant, at his request made after the making of the last mentioned indenture, to wit on &c., and, by the sufferance and permission of the said M. S., granted after the making of the said last mentioned indenture, to wit on &c., for the time in the first count mentioned, which commenced after the making of the last mentioned indenture, held, occupied and enjoyed the said undivided parts and shares as in the first count mentioned, and thereby became and was indebted to the [*296] said M. S. in *the said sum of 100*l.*, parcel as first aforesaid. That the said Louisa Smith, as such mortgagee as aforesaid, was, under and by virtue of the last mentioned indenture, from the time of the making thereof until and during the whole of the said time while the defendant so held &c. as aforesaid, entitled to the immediate actual possession of the said undivided parts and shares, and, at and from the time when defendant became so indebted as last aforesaid, and until and at the commencement of this suit, was, and yet is, entitled by action of trespass to recover from defendant the value of the profits of the said undivided parts and shares for and in respect of the said time while the said defendant so held, occupied, possessed and enjoyed the same as aforesaid. That, after defendant became indebted to the said M. S. in the said parcel, and before the commencement of this suit, to wit on &c., the said Louisa Smith, then being justly entitled to the said mortgage debt of 200*l.*, and to recover the value of the said profits as aforesaid, assigned to Edward Gaubert all her right to and interest in the said mortgage debt of 200*l.*, and the value of the said profits which she the said Louisa Smith was so as aforesaid entitled to recover from the defendant in respect of the time while he so held, occupied, possessed and enjoyed the said undivided

parts and shares, and authorized the said E. Gaubert to use the name of the said Louisa Smith for the recovery of the value of the last mentioned profits in whatever manner might be necessary. That afterwards, and before the commencement of this suit, to wit on &c., the said E. Gaubert gave defendant notice of the said assignment to him, and required the defendant to pay to him the said E. Gaubert the said first-mentioned parcel, in which the defendant was so indebted as aforesaid, and which *did not exceed [*297] the amount of the value of the profits, which amount the said E. Gaubert was then and still is entitled to recover in the name of the said Louisa Smith from the defendant. That, from the time when defendant became indebted to the said M. S. in the said first mentioned parcel until and at the time when the said notice was so given to him as aforesaid, defendant was ready and willing to pay the first mentioned parcel to the said M. S. And that, from the time when the said notice was so given hitherto, defendant has been and yet is liable to pay the same to the said E. Gaubert. Averment that the said accounts in the second and last counts respectively mentioned, so far as they relate to the said secondly and thirdly mentioned parcels, were so stated as in the declaration mentioned of and concerning the first mentioned parcel, and of and concerning no other money whatsoever. Verification.

Demurrer, assigning as causes that the plea was an argumentative denial: and others which it is not necessary to notice (1). Joinder.

Cleasby, for the plaintiff:

Assuming the plea to be well pleaded in form, it is bad in substance. All the cases on the subject are collected in the notes to *Moss* v. *Gallimore* (2) in Smith's Lead. Ca. (3). It was supposed in *Pope* v. *Biggs* (4) and *Waddilove* v. *Barnett* (5) that notice, given to a person who had been let into possession by the mortgagor after the legal *estate had been conveyed to the mortgagee, requiring [*298] him to pay his rent to the mortgagee, entitled the latter to recover the arrears of rent: but that is overruled: *Partington* v. *Woodcock* (6), *Evans* v. *Elliot* (7). It is clear that the notice in this case

(1) *Cleasby*, for the plaintiff, in the course of his argument relied on several objections to the manner in which the title was pleaded: but, as the COURT decided irrespectively of them, they are not further noticed.

(2) 1 Dougl. 279.

(3) 1 Sm. L. C. 310 [11th ed. p. 522].

(4) 32 R. R. 665 (9 B. & C. 245).

(5) 2 Bing. N. C. 538.

(6) 45 R. R. 592 (6 Ad. & El. 690).

(7) 48 R. R. 520 (9 Ad. & El. 342).

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cannot change the contract under which the defendant had already become indebted to the testatrix, so as to enable Louisa Smith to sue on that contract.

(PATTESON, J.: Why do you say that is clear? I, indeed, think it impossible that the mortgagee could under such circumstances recover in an action on contract: but other Judges entertain a different opinion. I never could understand it.

ERLE, J.: The plea here does not rest the defence on the supposed effect of the notice in enabling the mortgagee to sue on the contract, but on the ground that the defendant may be compelled to pay this very sum as mesne profits, and that he has received notice of that liability; but it is liability only. He does not say he has paid the money to any one.

LORD CAMPBELL, Ch. J.: Supposing that there are no formal objections to the plea, the question raised on this record seems to be, whether a liability of this kind, which may or may not end in an actual payment, is a good defence to an action.)

In all cases in which there is an outstanding legal estate, the tenant in possession may, in the same manner, be obliged to pay the mesne profits to him who has the right to bring ejectment. Therefore, if this plea is good, a tenant should always be allowed to plead that the legal estate is outstanding in one who claims the rent, and threatens to bring ejectment. Such a plea is bad, even when the [*299] tenant has under compulsion *of that threat paid the rent: *Boodle* v. *Cambell* (1).

(ERLE, J.: If we take notice of what a mortgage is in equity, the mortgagee is privy to the demise by the mortgagor in possession.

LORD CAMPBELL, Ch. J.: There is great difficulty in our noticing, at law, the nature of the equitable interest of the mortgagor. When there is a legal charge on the land, as in the case of a head landlord and a mesne tenant, an actual payment of the head landlord's rent by the puisne tenant, under pressure of a distress, would be an answer *pro tanto* to an action by the mesne tenant for his rent, on the principle that the tenant below has been obliged to pay a charge on the land which his intermediate landlord ought to have paid. But a mere liability to be distrained on would be no answer.)

1) 66 R. R. 721 (7 Man. & G. 386).

Keating, contrà:

The relation between mortgagor and mortgagee at law is that the mortgagor is tenant at sufferance to the mortgagee.

(PATTESON, J.: I can never agree to that. I know there are loose expressions in the books as to his being tenant at will, or tenant at sufferance: but he is not, in truth, a tenant at all.)

At all events, the mortgagee is entitled to recover the rent from the tenant, as mesne profits.

(LORD CAMPBELL, Ch. J.: He may bring ejectment and recover the mesne profits with or without notice. Your argument therefore goes so far as to say that the existence of the unsatisfied mortgage is in itself a bar. Actual payment may be good on the ground that the mortgagee is the authorized agent of the mortgagor to receive the rents: but is there any precedent of a plea like this? A defendant may *in many cases be in great danger from cross claims [*300] from which a court of law cannot relieve him. The threat of the mortgagee may afford a ground for going into equity for relief: but can it be a plea in bar at law? *Waddilove* v. *Barnett* (1) does not go so far as we must go if we support this plea.

PATTESON, J.: In Mr. Smith's note (2) to *Moss* v. *Gallimore* (3) it is said: "As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after the notice, or for rent which accrued due before the notice but was unpaid at the time when the notice was given. But there is a difference between the modes in which the tenant must plead in the former and in the latter case. In the former case he should plead *Non assumpsit*, and will be allowed to give the mortgage and notice in evidence, for 'when the mortgagee gave notice that the future rent was to be paid to him, it follows that the defendant ceased to occupy by the permission of the mortgagor, but by the permission of the mortgagee;' and, of course, such a defence amounts to a denial of the contract alleged in the declaration, which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, viz. where the rent became due

(1) 2 Bing. N. C. 538.
(2) 1 Sm. L. C. 517 b, 2nd ed. [See 11th ed. pp. 524, 525.]
(3) Dougl. 279.

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before notice, but was unpaid at the time of notice, the tenant must plead his defence specially, for 'the mortgagor had a right of action against the defendant up to the time when the notice was given, and [*301] before the mortgagee required the rent to be paid *to him:' so that the tenant, by setting up this defence, confesses that the right of action, stated in the declaration, once existed, but avoids it by matter *ex post facto*, viz. by the subsequent notice from the mortgagee." The propositions cited by Mr. Smith are from *Waddilove* v. *Barnett* (1). I think it a grave question whether the latter is not a fallacy. The point in truth did not arise in *Pope* v. *Biggs* (2); what fell from the Judges there were *dicta* merely. And I cannot comprehend how a right of action for the rents already due should be vested in the mortgagor before the notice, and the notice should undo that vested right of action and set up in lieu of it a right of action in the mortgagee. It was so said in *Waddilove* v. *Barnett* (1); but that case is beyond my comprehension.)

LORD CAMPBELL, Ch. J.:

The plea is new; and I am of opinion that this ingenious experiment should not be sanctioned. It calls on us, as a court of law, to do that which we have no power to do. We cannot protect this defendant from the threat of the mortgagee. Had the tenant under compulsion of that threat actually paid the mortgagee what was due, it might have been a defence. But this plea does not allege payment: it is a plea of a mere threat which may or may not be carried into effect. No authority has been cited in support of such a plea; and we ought not to make one.

PATTESON, J.:

I cannot see how the notice can be said to make this money not recoverable by the mortgagor and recoverable by the mortgagee, [*302] without denying *that the tenant held the premises by permission of the mortgagor. I do not see any way in which the mortgagee could sue this tenant for rent: but it is said that he may bring ejectment, and recover the same sum as mesne profits, and that he has threatened to do so: that, however, is no plea at law.

ERLE, J.:

Had it been pleaded that the tenant actually paid the mortgagee under this threat, I should have been inclined to support the plea. There has been so much doubt as to the legal situation of mortgagor

(1) 2 Bing. N. C. 538. (2) 32 R. R. 665 (9 B. & C. 245.)

in possession and mortgagee, that I say no more than that I think such payment might be a defence. But, as far as I can see on this plea, the present tenant may intend, after having enjoyed the land, to pay neither mortgagor nor mortgagee.

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Judgment for plaintiff (1).

MASSEY *v.* GOODALL.

1851. *June* 10

(17 Q. B. 310—316; S. C. 20 L. J. Q. B. 526; 15 Jur. 991.)

[310]

Assumpsit. Count: that defendant had become tenant to plaintiff on certain terms and stipulations, and, among others, that the rent should be payable half-yearly, that defendant "should not sell any straw &c. or manure, grown or produced upon the said farm, without the written licence" of the plaintiff, under certain penalties, and "that the penalties should be considered as additional rent, and should be recoverable by distress or otherwise as rent:" Averments, that "in consideration thereof" defendant promised plaintiff to pay "all such penalties as he might be liable to pay plaintiff according to the said stipulations;" and that defendant, without license, sold straw grown on the premises during his tenancy. Breach: non-payment of penalties in respect thereof. Plea: that the straw was sold after determination of the tenancy. Demurrer:

Held by Lord CAMPBELL, Ch. J. and PATTESON, J. that the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on those terms, and that the stipulation must be construed to be not at any time to sell straw grown during the tenancy: ERLE, J. *dissentiente*, and holding that the stipulation should be construed to be, not during the tenancy to sell straw &c. grown during the tenancy.

ASSUMPSIT. For that, whereas, to wit on &c., "defendant had become and was tenant from year to year to plaintiff of a certain farm" &c., "situate" &c., "at the yearly rent of 260*l.*, and on the following (among other) stipulations and conditions, viz. that the said rent should be payable half yearly on the 25th day of March and the 28th day of September in each year; that the defendant should not sell any hay, straw, or fodder, turnips or mangelwurzel, or manure, grown or produced upon the said farm, without the written licence of the landlord, under the following penalties, that is to say, for all hay so sold a penalty after the rate of 7*l.* per load, for all straw so sold a penalty after the rate of 5*l.* per load," &c. (fixing other penalties for all turnips or mangelwurzel and all manure so sold): "and that the said penalties so made payable as aforesaid should be considered as additional rent, and should be recoverable

(1) See, as to the right of the mortgagee out of possession to recover mesne profits, *Turner* v. *Cameron's Coalbrook Steam Coal Company*, 82 R. R. 927 (5 Ex. 932), and *Litchfield* v. *Ready*, 82 R. R. 932 (5 Ex. 939). See also *Mountney* v. *Collier*, 1 E. & B. 630.

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[*311]

by distress or otherwise as rent: and, in consideration thereof, he the defendant then promised the *plaintiff that he the defendant would pay the plaintiff all such penalties as he the defendant might be liable to pay the plaintiff according to the said stipulations and conditions for and in respect of any hay, straw," &c. "which should be grown or produced upon the said farm and sold by the defendant without the written licence of the plaintiff:" Averment: that defendant continued tenant to plaintiff upon the said stipulations and conditions until the said tenancy determined; and that defendant did, to wit on &c., without the written licence of plaintiff, sell to a certain person, to wit &c., ten loads of straw grown on the said farm during the said tenancy: whereby defendant according to his promise is liable to pay plaintiff 5*l.* for each of the said loads of straw so sold by defendant as aforesaid, amounting in the whole to 50*l.* Breach, non-payment.

Plea. That the said straw so in the declaration alleged to have been sold was sold by defendant after the determination of the said tenancy in the declaration mentioned, to wit on &c.; and not otherwise. Verification.

Demurrer, assigning as causes: That the plea raises an immaterial issue, and neither traverses nor confesses and avoids the breach of contract alleged: that it is immaterial whether the straw alleged to have been sold by defendant was sold by him before or after the determination of the tenancy, provided that it was straw grown on the said farm during the tenancy, &c.

The COURT called upon

Cowling, in support of the plea:

The stipulation is, in effect, that the tenant shall not sell the straw &c. during the tenancy; that is shown by the agreement

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*that the penalties shall be recoverable as rent: which could not be if they were incurred after the tenancy expired. And this is a reasonable construction; for there is nothing in the agreement rendering it imperative on the tenant to consume the farm produce on the farm. He may carry it away and consume it on his new farm if he has one; but, if he has no farm, he must, according to the construction put on the agreement by the plaintiff, suffer it to rot, or make a present of it to the landlord; for he has no power to consume it on the farm which is no longer his, and there is nothing to enable him to compel the landlord to pay for any farm produce left on the farm.

(LORD CAMPBELL, Ch. J.: How do we know that? The declaration professes to set out some only of the stipulations. There may be a stipulation that the landlord shall buy at a valuation what farm produce is left.)

If there were such a stipulation, it would afford an argument in favour of the plaintiff's construction; and, as he has not set it out in the declaration, it must be taken, as against him, that there is no such stipulation. Further: the consideration is a bygone one, and can support only the promise implied by law. The law will not imply from a tenancy a promise as to the conduct of the tenant after the tenancy is determined.

C. J. Bayley, for the plaintiff, was then called on:

The parties have agreed on the terms on which the defendant was to be tenant. They might if they pleased have restricted the stipulation, as to not selling straw &c., to the time of the tenancy; but they have not thought fit to do so. The Court will not put a sense on the words different from that which they naturally *bear, [*313] without some strong reason. Here the reasonable construction is the natural one.

LORD CAMPBELL, Ch. J.:

I am of opinion that the plaintiff is entitled to judgment. The declaration alleges that the defendant became tenant to the plaintiff "on the following (among other) stipulations and conditions." So it does not profess to set out all the stipulations and conditions, but only such as are broken, and in respect of which the action is brought. It then proceeds to state a condition "that the defendant shall not sell any hay, straw," &c. "grown or produced upon the said farm, without the written licence of the landlord." Here is an allegation of a positive and unqualified stipulation, that the defendant should not sell straw grown on the farm; and it is assigned, as a breach of it, that he did sell straw grown on the farm during the tenancy: but it appears that the sale was not during the tenancy. The question then is, Whether that breach be well assigned? I think it is; it comes within the express words, and I think within the intention, of the agreement. If the stipulation were confined to sales during the continuance of the tenancy, there would be nothing to prevent the tenant, during the last year, from hoarding up all the produce of the farm, spending no

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part of the manure on the farm, and, the day after the tenancy determined, selling it all, leaving the farm ruined and exhausted. I do not think that such a construction would make the agreement reasonable as between landlord and tenant. It is said that on the other construction there is a hardship on the tenant, who may not be able to use all the farm produce while he is tenant, and is [*314] prohibited from selling it afterwards: *but we have not all the stipulations set out; and, for aught I know, among those not set out may be a stipulation that the landlord or the incoming tenant shall pay for all that the outgoing tenant leaves behind. Such a provision would obviate this supposed hardship. But, at all events, this breach comes within the express words of the agreement, and, as I think, within its spirit also.

PATTESON, J.:

I am entirely of the same opinion. The declaration alleges that the defendant had become and was tenant from year to year to the plaintiff on the following (among other) stipulations; and the promise is laid in consideration of that. It is not alleged that he became and was tenant at his request; but I take it that it is only necessary to lay a request where the consideration was wholly bygone and executed at the time of the promise, and that it is not necessary when it is a continuing consideration, as this is, where the terms would continue after the promise throughout the whole tenancy. *King* v. *Sears* (1) and other cases, I think, establish that distinction. Then the declaration sets out some of the terms, and, among them, that the defendant shall not sell straw grown upon the farm without a written licence; nothing is said to limit the restriction to a sale during the tenancy. The stipulation is expressed without restriction, that he shall not sell straw under a penalty; and in consideration of the premises the promise is laid to pay all penalties incurred according to the stipulations. *Mr. Cowling* says that the [*315] consideration will not support the promise. *Now I agree that a past consideration will support the promise implied by law, and, as a general rule, will support no other promise. But here the defendant became tenant to the plaintiff on certain terms: whatever those terms were, the law would imply a promise to observe them; and the promise laid here is no more than a promise to observe one of those terms; that is, to pay penalties according to those stipulations. The question therefore comes to be whether it

(1) 2 Cr. M. & R. 48; *S. C.* 5 Tyr. 587.

is a breach of those stipulations, to sell, after the determination of the tenancy, produce raised on the farm during the tenancy. If he had sold it during the tenancy, it would have been a clear breach. That the defendant waited till the term had expired before he sold, I think, makes no difference. The penalties are to "be considered as additional rent" and to be "recoverable by distress or otherwise as rent." That I think only means that the parties agreed that the plaintiff was to have the same remedies for recovering the penalty that he would have for his rent: and, though one remedy to recover rent, namely distress, does not apply after the determination of the tenancy, others, such as this very action of assumpsit, remain. I therefore see nothing in this stipulation to show that the time of sale was material; and it seems to me that it was not.

ERLE, J.:

I put a different construction on the terms set out in this declaration. The defendant became tenant on stipulations, amongst others, that the rent should be payable half yearly, and that the defendant should not sell any straw &c. produced on the farm without licence, under a penalty. Some of these stipulations must be confined to the time of the tenancy. They are entered *into in consideration that the relation of landlord and tenant is created: and I think that the implied qualification "whilst the relation of landlord and tenant continues" pervades them all. The whole of the stipulations are not set out; but, if there are any affecting the construction of those set out, it is the plaintiff's fault that they are not before us. Taking it that we have all that is provided for on this point, and that the agreement is imperfect, which is what I infer from the declaration, there is nothing provided as to the landlord taking the produce at the end of the term. The question therefore arises, whether on these stipulations the tenant is, at the end of the term, bound to leave the produce as manure for the landlord without any remuneration, or is entitled, after the expiration of the term, to use it as his own. It seems to me that, on the construction of these terms, he is entitled to use it as his own. He has done so; and I think the defendant entitled to judgment.

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Judgment for plaintiff.

1851. *June* 6, 13.

CHELSEA WATERWORKS COMPANY *v.* BOWLEY (1).

(17 Q. B. 358—362; S. C. 20 L. J. Q. B. 520; 15 Jur. 1129.)

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A Waterworks Company, incorporated in pursuance of a local Act, were empowered to lay pipes in the streets, roads, &c., and did lay pipes accordingly. The Company were assessed to the land tax, as holders of land in a district within which they had pipes laid down, but in which they had no other property; and their goods were distrained for land tax.

In an action of trespass for so taking the goods of the Company: Plea: Not guilty, by statute:

Held, that they were not liable to be assessed to the land tax for the land occupied by their pipes.

TRESPASS for seizing goods. Plea: Not guilty, by statute. Issue thereon.

By order of a Judge, and by consent of the parties, a case was stated for the opinion of this Court.

The substance of the case was, that the Company were incorporated for the purpose of erecting waterworks by a charter of incorporation granted to them in 9 Geo. I., in pursuance of stat. 8 Geo. I. c. 26 (2); and that their powers were enlarged by further letters patent granted in 7 Geo. II., and by stat. 49 Geo. III. c. clvii. (3).

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They were empowered, among other things, to purchase and hold lands, not exceeding in value 1,000*l.*; and also, by sects. 8 and 9 of stat. 8 Geo. I. c. 26, to lay pipes from their waterworks through the streets, roads, &c., in and about Westminster.

In pursuance of their powers, they did purchase lands, lying entirely within the parish of St. George, Hanover Square, on which their waterworks and reservoirs were erected; and from thence laid down pipes through the streets &c. in the adjoining parishes of St. Margaret and St. John, Westminster. The Company had no other interest in the soil in those last mentioned parishes than arose from their having the pipes thus laid down. They were in 1847, for the first time, assessed to the land tax by the Commissioners of the division consisting of St. Margaret and St. John, Westminster; the property in respect of which they were so assessed was described in the assessment as "Land occupied by the mains and pipes and other apparatus of the said Governor and

(1) Discussed and dist. in *Metropolitan Ry. Co.* v. *Fowler* [1893] A. C. 416, 422, 428, 62 L. J. Q. B. 553, 69 L. T. 390.

(2) "For better supplying the city and liberties of Westminster, and parts adjacent, with water." See, as to the powers of the Company, *Rex* v. *The Chelsea Waterworks Company*, 9 R. R. 438 (5 B. & Ad. 156).

(3) Local and personal, public. "For amending an Act" &c. (8 Geo. I. c. 26), "and for enlarging the powers thereof."

Company for the conveyance and supply of water." The defendant, by the authority of the Commissioners, distrained for the rate. The question submitted to the Court was, Whether the Company are liable to be assessed towards the land tax within the said division of St. Margaret and St. John under the circumstances above set forth.

The case was argued in this Term (June 6th) (1) by *Crowder* for the plaintiff and *Willes* for the defendant. The arguments on both sides sufficiently appear in the judgment.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered judgment:

We are of opinion that the Chelsea Waterworks Company *are [*360] not liable to be assessed towards the payment of land tax within the division of St. Margaret and St. John, Westminster. We should have had no difficulty in arriving at this conclusion, had it not been for the decisions holding this and similar Companies liable to be assessed to the poor's rate under stat. 43 Eliz. c. 2, in respect of the same subject-matter.

The validity of the present assessment is rested on the 4th section of stat. 38 Geo. III. c. 5: whereby it is enacted (2) that all bodies corporate having or holding any lands or hereditaments shall be charged to the land tax. The question is whether, in respect of what the Company have done, and now enjoy, under the powers conferred upon them by sects. 8 and 9 of stat. 8 Geo. I. c. 26, they can be said to have or to hold any land or hereditament. Although it has been considered for more than a century that they do not, they could not resist the assessment if they ever were liable to be assessed to the land tax. But we think that the parishes through which their pipes pass have acted properly in omitting to assess them. The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another: and, whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us for this

(1) Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) Sect. 4 enacts: "That all and every manors, messuages, lands, and tenements," &c., "and all hereditaments, of what nature or kind soever," situate &c. and being within the respective cities, &c. aforesaid (of which Westminster is one), "and all and every person," &c., "bodies politic and corporate," &c., "having or holding any such manors," &c., in respect thereof shall be charged &c.

CHELSEA WATER-WORKS COMPANY v. BOWLEY.

purpose to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditament; nor *do we think that the pipes when laid can be so considered, within the meaning of the Land Tax Acts. These Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant, and property the land tax of which might be redeemed. The whole scope of the Acts is to throw the tax as a charge upon the landlord; and the tenant, having paid the tax, is authorized by section 17 of stat. 38 Geo. III. c. 5, to deduct it out of the rent. The Company are not the owners of the land where the pipes lie; nor are they the tenants of this land; and there is no rent from which they can deduct the amount of the assessment when they have paid it.

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Again, the provisions of stat. 42 Geo. III. c. 116, for the redemption of the land tax, are wholly inapplicable to such a subject, although it was clearly intended that the land tax on all property which could be considered land was to be redeemable. The moment the Company take up their pipes which had been laid under the streets of any particular parish, all pretence for saying that they have or hold land in the parish would be gone: but, after the pipes are removed, all the land in the parish would remain, and it would be had and held as before.

The Bath, Brighton and *Chelsea Waterworks* cases (1), touching the assessment of Companies to the relief of the poor in respect of pipes for the conveyance of water or gas, as "occupiers of land," have been very properly much relied upon; for they appear to be closely in point. We by no means feel ourselves at liberty to overrule these cases, or even to express a *doubt whether they were rightly decided. But "land," like the word "inhabitant," which likewise occurs in stat. 43 Eliz. c. 2, has various meanings; and it may, in that statute passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although in other Acts of Parliament it means a legal interest in the soil. This is the meaning which we think it bears in the Land Tax Acts: and, if so, the Company had not, nor held, any land or hereditament which rendered them liable to be assessed to the land tax: and they are entitled to our judgment.

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Judgment for plaintiffs.

(1) *Rex* v. *The Corporation of Bath*, 13 R. R. 333 (14 East, 609); *Rex* v. *Brighton Gas Light Company*, 29 R. R. 290 (5 B. & C. 466); *Rex* v. *The Chelsea Waterworks Company*, 39 R. R. 438 (5 B. & Ad. 156).

REG. *v.* AMBERGATE, &c. RAILWAY COMPANY.

1851. *June* 13.

(17 Q. B. 362—365; S. C. 15 Jur. 991.)

[362]

A motion for *mandamus* to a Railway Company to carry out their line, which it is alleged they are leaving incomplete by *laches*, may be grounded on a demand made by a shareholder in the Company itself.

A RULE *nisi* was obtained last Term for a *mandamus* calling upon the above-named Company, established under stat. 9 & 10 Vict. c. clv., local and personal, public "for making a railway from or near the Ambergate station of the Midland Railway, through Nottingham, to Spalding and Boston, with branches therefrom, and for enabling the Company to purchase the Nottingham and Grantham canals," and stat. 10 & 11 Vict. c. lxxviii. (1), local and personal, public, to complete the line of their railway from Ambergate to Grantham. The rule was *granted at the instance of the proprietors of the Grantham Canal Navigation, established under stats. 33 Geo. III. c. 94, and 37 Geo. III. c. 30. By the affidavits on which the motion was grounded, it appeared that the railway had been completed and opened from Nottingham to Grantham, and, in the opposite direction (towards Ambergate), from Nottingham to Bulwell; but that the residue of the line, from Bulwell to the Ambergate station, had not been commenced: that the Railway Company, as was believed, did not intend completing it; and that a committee of shareholders and directors appointed to report upon the undertaking had (on May 5th, 1848) given their opinion against carrying the line farther: That the opening of the portions of railway already completed had diminished the tolls and profits of the Canal Company, and was likely to be a permanent injury to their property: That they had always been ready and willing to convey their Navigation, lands and works to the Railway Company, as, by the first mentioned Act, they were required to do: And that the construction of the remaining portion of the railway would be of great public benefit. To prove a demand on the Railway Company, affidavit was made of their having been served, on March 8th, 1851, with the following notice, dated the same day, and signed by Henry Thompson stating himself therein to be a shareholder; but who was not one of those who made the above mentioned report. The service was by his clerk.

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"I Henry Thompson, of Grantham, in the county of Lincoln, solicitor, a proprietor of five shares in the Ambergate, Nottingham

(1) Enabling the Company to alter their line, and make a branch to Nottingham.

REG. v. AMBERGATE &C. RAILWAY COMPANY.

and Boston and Eastern Junction Railway Company, hereby give you notice that, unless proper proceedings shall, on or before the 25th day of March instant, be taken to make and complete the whole main line of railway and branches authorized to be made by the said Company pursuant to the provisions of *the Ambergate" &c. "Railway Act, 1846, and of the Ambergate" &c. "Railway Amendment Act, 1847, I shall institute such proceedings as I may be advised at law and in equity for the purpose of compelling the said Company to complete such main line and branches, and to restrain the said Company and the directors thereof from applying any of the profits or other funds of the said Company to any other purpose than for the purpose of such completion, and from doing any act which may prevent, or from neglecting to do any thing which may be necessary for, the completion of such main line and branches. Dated" &c.

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There was also an affidavit showing that, on May 12th, a survey and enquiries had been made along the formerly proposed line from Bulwell to the Ambergate station, and that no preparation appeared to have been made for constructing the railway in that direction.

Willes now showed cause.

(The COURT enquired of *Sir F. Kelly*, who supported the rule, for whom he appeared.

Sir F. Kelly: For Thompson and for the Grantham Canal Company.)

There has been no sufficient demand and refusal. The Canal Company themselves have made no demand; and, supposing that they could avail themselves of Thompson's demand, he himself could not regularly make it; for he has no authority unless as a shareholder in the Railway Company; and (assuming that the notice, which is the only evidence on the subject, sufficiently proves him to be a shareholder) the reception of the report made on May 5th shows a *laches* which disables any member of the Company from making this demand.

(LORD CAMPBELL, Ch. J.: The demand by Thompson as a shareholder appears sufficiently for the present purpose.)

There is no sufficient evidence of a refusal.

(ERLE, J.: The omission to take any step after the notice is a tacit refusal.

LORD CAMPBELL, Ch. J.: Enough appears to call upon you to show performance.)

Sir F. Kelly, with whom were *Peacock* and *Pearson*, was then called upon by the COURT, as to the demand by Thompson.

(PATTESON, J.: Is there any instance of a shareholder making such an application as this, to ground a motion for *mandamus* against the Company of which he is one?

LORD CAMPBELL, Ch. J.: I do not see why he may not. It is assumed that the performance is not only their duty, but for their advantage.)

An advantage with a view to which he has invested his money.

(PATTESON, J.: He calls upon himself, among others, to perform the duty.

LORD CAMPBELL, Ch. J.: He may have been a shareholder who dissented from an adoption of the report. If he joined in the adoption, that might be an estoppel. I do not see an objection otherwise.)

The report was merely a recommendation submitted to the Company.

(PATTESON, J.: In *Reg.* v. *The Eastern Counties Railway Company* (1) the application was made by shareholders in the Company as well as by landholders.)

Sir F. Kelly was then stopped by the COURT.

LORD CAMPBELL, Ch. J.:

We all think that the rule should be made absolute.

PATTESON, COLERIDGE and ERLE, JJ. concurred.

Rule absolute (2).

(1) 10 Ad. & El. 531. See pp. 539, 549.

(2) See, as to proceedings on the *mandamus*, *Reg.* v. *Ambergate &c. Railway Company*, 1 E. & B. 372.

1851.
May 30.
June 13.

DOE D. PALMER *v.* MARTHA EYRE (1).

(17 Q. B. 366—373; S. C. 20 L. J. Q. B. 431; 15 Jur. 1031.)

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Lessor of plaintiff was the assignee of a mortgage, made more than twenty years before ejectment brought; but the mortgagor had, within twenty years, paid interest on the mortgage. Defendant had been let into possession more than a year before the mortgage, by the mortgagor, and suffered by him, as a favour, to occupy the premises without payment of rent, and without any written acknowledgment. The mortgagor's right of entry as against defendant accrued, under the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), less than twenty years before the mortgage, but more than twenty years before ejectment brought:

Held, that the Real Property Limitation Act, 1837 (7 Will. IV. & 1 Vict. c. 28), preserved to the lessor of the plaintiff, being a mortgagee, the same right of entry as if the Real Property Act, 1833, had not passed: and that, the defendant's possession never having been such as, before the Act of 1843, would have been adverse to the lessor of the plaintiff, he was entitled to recover; though the mortgagor's right of entry within the meaning of that Act, had accrued before the mortgage, and was barred under that Act by lapse of time before commencement of the action.

EJECTMENT for a house. On the trial, before Cresswell, J., at the last Spring Assizes at York, it appeared that, in 1823, John Eyre, the owner in fee of the house, mortgaged it, with other property, for a term of 500 years, to a person deceased, whose executor was the lessor of the plaintiff; and interest had been paid by John Eyre in 1841. The defendant, Martha, was the sister of John Eyre. Her mother had been tenant for life of the house; the defendant had resided there with her mother up to the time of the mother's death in 1821; and from that time, which was before the mortgage and more than twenty years before the commencement of the action, she had been permitted by John Eyre, who on the death of the tenant for life became entitled to the fee, to reside there without payment of rent; and she never had made any written acknowledgment of her brother's title. It was contended for the defendant that by stat. 3 & 4 Will. IV. c. 27, the entry was barred. The answer was, that the right of entry was preserved by
[*367] stat. 7 Will. IV. & 1 Vict. *c. 28. The learned Judge directed a verdict for the defendant, reserving leave to move to enter a verdict for the plaintiff.

Knowles, in last Easter Term, obtained a rule *nisi* accordingly.

Watson and *R. Hall*, in this Term (May 30th), showed cause (2):

The defendant was in possession in 1821; and the right of entry

(1) Dist. and cons. *Thornton* v. *France* [1897] 2 Q. B. 143, 66 L. J. Q. B. 705, C.A.

(2) Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

first accrued, within the meaning of stat. 3 & 4 Will. IV. c. 27, s. 2 (1), at the latest in 1822. If the possession of the defendant commenced in such a manner that, under the old law, it would have been held *possessio fratris*, the effect of stat. 3 & 4 Will. IV. c. 27, s. 13, is that the right of entry accrued in 1821 when she first entered. If she was tenant at will, or from year to year, it accrued, under sects. 7 and 8, at the end of a year, that is, in 1822. In either way, the right of entry of John Eyre, and those claiming under him, was barred, several years before this action commenced. But it is said that, inasmuch as the lessor of the plaintiff is a mortgagee, his right of entry is given by stat. 7 Will. IV. & 1 Vict. c. 28. That statute was passed immediately after the decision in *Doe* d. *Jones* v. *Williams* (2), in consequence of the doubt there thrown out by PATTESON, J.

(LORD CAMPBELL, Ch. J.: The point suggested by my brother PATTESON alarmed mortgagees, as well it might: and, in consequence, that very learned Judge LITTLEDALE drew the Act 7 Will. IV. & 1 Vict. c. 28.)

The object of that Act was to obviate the doubt whether the mortgagee was not by stat. 3 & 4 Will. IV. c. 27, barred as against the mortgagor. It effectuates *that object; the mortgagee may enter upon the mortgagor, and upon any one on whom the mortgagor could enter: but it never could be intended that a mortgagee could enter on any person. It may be material to observe that the right of entry in the present case accrued before the mortgage; and therefore the question comes to be whether a person out of possession of land can, by a subsequent mortgage and payment of interest, confer a right of entry on another, which shall continue after his own is barred. In *Doe* d. *Goody* v. *Carter* (3) the lessor of the plaintiff was a mortgagee, yet the statute was held a bar.

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Knowles and *Unthank*, *contrà*:

In *Doe* d. *Goody* v. *Carter* (3) it does not appear that interest had been paid within the twenty years; most probably there was no evidence of that fact; at all events the Court had not their attention called to stat. 7 Will. IV. & 1 Vict. c. 28, and gave no decision on its construction. This is the first time that the COURT

(1) See now 37 & 38 Vict. c. 57, s. 1.

(2) 44 R. R. 421 (5 Ad. & El. 291).

(3) 72 R. R. 472 (9 Q. B. 863).

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has had to give the statute a judicial interpretation. Its object was to secure mortgagees, whose title was shaken by stat. 3 & 4 Will. IV. c. 27; that could scarcely be effected by anything short of an enactment that a mortgagee who had received payment within twenty years should be in the same position in which he was before stat. 3 & 4 Will. IV. c. 27; and, accordingly, the words of stat. 7 Will. IV. & 1 Vict. c. 28, are express, that he may make his entry "anything in the said Act notwithstanding." The meaning must be, that he is barred where, before stat. 3 & 4 Will. IV. c. 27, [*369] he would have been barred, and not otherwise. *Now in the present case it is clear that, but for stat. 3 & 4 Will. IV. c. 27, the lessor of the plaintiff would have had a right of entry; for the possession of the defendant never was adverse to that of her brother John Eyre, nor, consequently, to that of his mortgagee. It would be different, probably, if the possession of the defendant had been adverse, or if the title of the mortgagor had been extinguished under stat. 3 & 4 Will. IV. c. 27, s. 34, at the time of the mortgage.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered the judgment of the COURT:

We are of opinion that in this case the verdict ought to be entered for the lessor of the plaintiff. Looking only to stat. 3 & 4 Will. IV. c. 27, the action is barred; for it was not commenced within twenty years (1) next after the time at which the right to bring such action first accrued to the lessor of the plaintiff or to any person through whom he claims. The facts that the defendant was the sister of John Eyre, and that she held with his consent, are now immaterial; the possession of a relation of the person entitled being no longer deemed the possession of the heir, and lapse of time for the requisite period, without payment of rent or written acknowledgment, giving a title irrespective of any consideration whether the possession was adverse. The defendant, having been tenant at will to her brother, had been in possession more than twenty-one years from the time of her entry, without payment of rent or any written acknowledgment; and under stat. 3 & 4 Will. IV. c. 27, the fee would have vested in her: *Doe* d. [*370] *Goody* *v. *Carter* (2). But we must look to the statute, 7 Will. IV. & 1 Vict. c. 28, upon which a court of law is now for the first time called upon to put a construction.

(1) Now twelve years; see 37 & 38 Vict. c. 57, s. 1.—A. C.

(2) 72 R. R. 472 (9 Q. B. 863).

In the year 1823 John Eyre, being seised in fee of the house in question, mortgaged it for a term of 500 years: the lessor of the plaintiff is now the assignee of the mortgage; and the mortgagor had paid him interest on the mortgage till recently before the commencement of this action. His counsel contend therefore that his right of recovery is the same as if stat. 3 & 4 Will. IV. c. 27, had never passed, in which case, there having been no adverse possession, the action would clearly have been maintainable. The statute relied upon, after reciting that doubts had been entertained as to the effect of the former statute "so far as the same relates to mortgages," enacts "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land" to "bring an action" "to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right" to bring such action "shall have first accrued." This language in its natural and grammatical sense applies to the present case. The lessor of the plaintiff is entitled to and claims under a mortgage of the house to recover which the action is brought; and he has brought his action within twenty years next after the last payment of interest secured by such mortgage, although more than twenty years had elapsed since the time at which the right to bring the action had first accrued. The defendant's counsel contend that the enactment must be confined to the case *where the mortgagor has [*371] himself been and continued in possession of the mortgaged premises, or might himself maintain an ejectment against a tenant in possession; and we are told that its object was to remove a doubt whether, where the mortgagor had been allowed to remain in possession more than twenty years after the forfeiture of the mortgage by default in repaying the mortgage money, although the interest on the mortgage continued to be regularly paid, the mortgagee could maintain an ejectment against the mortgagor or his tenants. But we must learn the object of the Legislature from the language of the statute: and it clearly appears to have been, to make mortgages an available security, where they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with any *laches*. This object would be effectually defeated if we were to adopt the limited construction proposed, by interpolating the words necessary for that purpose. In the vast majority of mortgages in England the

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mortgagor is not in the actual possession of the mortgaged lands when the mortgage is executed, and they afterwards remain in the possession of his tenants. The mortgagee and those who advise him are perfectly satisfied if, upon reference to a conveyancer, the title to the premises to be mortgaged is pronounced good, and, upon a reference to a surveyor, the value is found to be sufficient. If the mortgagee receives regular payment of his interest under the mortgage, he never enquires, and he would not be allowed to enquire, whether rent is regularly paid by the tenants to the mortgagor.

[*372] The mortgagor, therefore, according to the defendant's construction of the statute, by omitting to receive *rent for twenty years or to obtain a written acknowledgment from a tenant, may place the mortgagee in the position of suddenly finding that for the repayment of the mortgage money he must look only to the personal credit of an insolvent. On the other hand it is said that, although there may be little sympathy for a person who, like the defendant, ungratefully and fraudulently seeks to turn long continued kindness into the means of robbing a benefactor, we must regard the hardship which may be thrown upon a purchaser for value, who for twenty years has been in undisputed possession of the estate. But a purchaser can only be affected by mortgages executed prior to his purchase; in a register county he must have full notice of a prior mortgage, or it is void as against him; and, even without the benefit of a register, there must have been negligence on his part if an existing mortgage is not discovered. It was argued before us that the owner of an estate, who is himself barred by a tenant having occupied twenty years without payment of rent or acknowledgment, might, by executing a mortgage, and payment of interest to a mortgagee, vest in the latter a right of entry which he could not exercise himself: but by such a mortgage nothing would pass, under stat. 3 & 4 Will. IV. c. 27, s. 34, the right of the owner being extinguished at the end of the period of limitation.

A case may be put, where a person who has occupied as tenant by sufferance nearly twenty years without payment of rent or written acknowledgment might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises and going on, for a great many years afterwards, paying interest to the

[*373] mortgagee. But it cannot be considered to have been *an object of the Legislature to protect the interest of such a person. The mortgagor certainly may, in some cases, gain a consequential advantage by our construction of the statute, although it was

passed for the security of mortgagees. Still, without this, the security intended to be given to mortgagees cannot be enjoyed.

Seeing no inconvenient consequences which would follow from supposing that the words of the Legislature were used in their natural and grammatical sense, we think that we are not at liberty to put any forced or limited construction upon them, and therefore that the lessor of the plaintiff is entitled to our judgment.

Rule absolute.

DOE D. BADDELEY AND WALLER *v.* MASSEY (1).

1851. *June* 7, 13.

(17 Q. B. 373—382; S. C. 20 L. J. Q. B. 434; 15 Jur. 1031.)

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A tenant taking in land adjacent to his own, by encroachment, must, as between himself and the landlord, be deemed, *primâ facie*, to take it as part of the demised land: but that presumption will not prevail for the landlord's benefit against third persons.

The landlord of A. and B., adjacent closes, mortgaged them, and afterwards demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it, saying he had granted rights over B. to occupiers of other adjoining lands. The tenant held both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B.: Held that, on this evidence, he might insist, as against the landlord, on a twenty years' occupation of B. within the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), ss. 2 and 3.

On a purchase of lands which were under mortgage, the purchaser paid the principal and interest due on the mortgage, and took a conveyance in which mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption and all the residue of his interest:

Held that the purchaser was a person "claiming under" a mortgage, within the Real Property Limitation Act, 1837 (7 Will. IV. & 1 Vict. c. 28); and that the twenty years' limitation under the Real Property Limitation Act, 1833, s. 2, ran from the paying off of the mortgage and interest.

EJECTMENT for a workshop &c., and one acre of land, in the parish of St. James, Clerkenwell, in the *county of Middlesex. Demises, [*374
by Baddeley on 13th and by Waller on 12th, of April, 1850. The plaintiff's particular of demand described the premises as a piece of ground situate between the backs of the gardens of the houses Nos. 9 and 10, Wilmington Square, in the above named parish (or part of the said gardens), and the gardens or yard of houses in John Street, Wilmington Square, aforesaid; together with the workshop, erections and buildings standing and being thereon.

On the trial, before Coleridge, J., at the sittings in Middlesex during last Easter Term, it appeared that, in April, 1821, the

(1) Dist. *Thornton* v. *France* [1897] 2 Q. B. 143, 66 L. J. Q. B. 705.—A. C.

DOE d. BADDELEY v. MASSEY.

Marquis of Northampton, being tenant in fee of a piece of ground called Spa Fields, demised certain parcels of it to George Goodwin for 99 years: and that Goodwin, in May, 1822, demised part of these lands, including the ground now in question, to John Wilson, a builder, for 95 years. Houses, 9 and 10, Wilmington Square, had already been built upon the demised lands. In July, 1822, Wilson mortgaged the lands to Benjamin Goode for the residue of the term, to secure payment of 3,000*l*. In 1824 Goode, by conveyance to which Wilson was a party, assigned the mortgage to Stewart Marjoribanks and others. In June, 1825, Wilson executed a further mortgage to George Child of the same premises, subject to the mortgage last before mentioned.

Wilson continued in possession, and, on 26th May, 1829, demised a part of the mortgaged lands, adjoining the parcel now in dispute, to Massey, the defendant, for 21 years. Massey soon afterwards requested Wilson to grant him a lease also of the ground now in question (being at that time waste) for the purpose of building. Wilson had already granted a right of way over this ground to the occupiers of 9 and 10, Wilmington Square; *and he therefore declined to grant Massey the lease, or any permission to build on the spot; and he told Massey that, if he built there, he must do it on his own responsibility. Massey then built on this piece of ground the workshop and premises described in the particular, Wilson not interfering, and never receiving any rent in respect of this parcel.

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By indenture between Marjoribanks and his co-mortgagees of the first part, George Child of the second part, Wilson of the third part, and Robert Child of the fourth part, dated 20th August, 1834, the principal and interest due on the mortgages being then paid off, Wilson's term in all the mortgaged premises was assigned, by direction of Wilson, to Robert Child (the party paying off the mortgages), to hold free from the said mortgages; and all Wilson's equity of redemption, and all the rest, residue &c. of his interest in the premises, were at the same time conveyed to R. Child. On his death his executors, according to the directions of his will, sold the premises, and assigned the term to William Croft Fish, the purchaser. On the death of Fish, his executor, in 1846, acting under the directions of his will, sold the premises and assigned them to Richard Rock Baddeley, the first lessor of the plaintiff. The other lessor of the plaintiff, Arthur Waller, claimed under a mortgage from Baddeley, executed in 1846.

Massey on the expiration of his lease, in 1850, gave up the

premises demised to him by Wilson, but refused to surrender the land adjoining.

It was urged on behalf of the defendant that the action was barred by stat. 3 & 4 Will. IV. c. 27, ss. 2, 3, for want of possession or receipt of rent within twenty years; and that the claim was not saved by stat. 7 Will. IV. & 1 Vict. c. 28, the lessor of the plaintiff Baddeley *not being a person "entitled to or claiming under any [*376] mortgage" within the meaning of that Act. COLERIDGE, J. directed a verdict for the plaintiff on the first demise, giving leave to move to enter a nonsuit. The defendant had a verdict on the second demise. *M. Chambers*, in last Easter Term, obtained a rule *nisi* according to the leave reserved. In this Term (1),

Knowles and *Hawkins* showed cause:

First, the defendant cannot dispute that he held the close in question, down to 1850, as tenant to Wilson and his assigns. This and the close demised in 1829 were parts of one estate which was in the hands of Wilson. The close in question was not demised by Wilson to Massey; and it is said that others had rights over it: but Massey encroached upon it with the acquiescence if not the consent of Wilson; and, at all events, any encroachment which he made during his tenancy must be taken to have been for the benefit of his landlord, if the contrary be not proved: *Doe* d. *Lewis* v. *Rees* (2), *Doe* d. *Dunraven* v. *Williams* (3), *Doe* d. *Harrison* v. *Murrell* (4), *Doe* d. *Lloyd* v. *Jones* (5). An inclosure of waste by a tenant is to be presumed to have been made for the landlord and with his assent, particularly where the landlord has a reversionary interest in such waste: *Bryan* d. *Child* v. *Winwood* (6). If so, the close here in question was inseparable from the land demised in 1829, and should have been given up with it.

(LORD CAMPBELL, Ch. J.: The principle of law must be that the *lessee is estopped from denying that the whole premises are those [*377] which were demised to him. It would be strange to lay down that the tenant steals for the benefit of his landlord.)

There is nothing here to rebut the presumption that the land was taken in for the landlord's benefit.

(1) June 7th. Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) 6 Car. & P. 610.

(3) 48 R. R. 792 (7 Car. & P. 332).

(4) 8 Car. & P. 134.

(5) 71 R. R. 772 (15 M. & W. 580). See *Andrews* v. *Hailes*, 2 E. & B. 349).

(6) 9 R. R. 751 (1 Taunt. 208).

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(LORD CAMPBELL, Ch. J.: If it was so taken, the landlord is thereby entitled as against the tenant who took, but not as against a third person.)

If that person did not interfere for twenty years, the fact might operate as against him. On the evidence in this case, the tenant's conduct is not that of a person encroaching for himself. He applies for a lease, is told that the landlord will not interfere (having a difficulty in granting the lease, on account of his own conduct with respect to a right of way), and then openly proceeds in the same manner as if the lease had been granted.

But, further, the claim of the lessor of the plaintiff is saved by stat. 7 Will. IV. & 1 Vict. c. 28, the last payment of interest on Wilson's mortgage having been made on 20th August, 1834. That statute was passed expressly for the relief of mortgagees, whose rights were doubtful under stat. 3 & 4 Will. IV. c. 27.

(LORD CAMPBELL, Ch. J.: The immediate evil contemplated was that the statute of 3 & 4 Will. IV. might be held to run from a default in payment of the mortgage money, though the interest might have been paid for nineteen years afterwards (1). But the Act may apply to other cases.)

It is true that, in this case, Wilson's mortgage was paid off before Robert Child acquired the title from which that of Baddeley is
[*378] derived. But the conveyance to Robert *Child was by the mortgagor and mortgagee; and stat. 7 Will. IV. & 1 Vict. c. 28, preserves the right (for twenty years after any payment of interest) to any person "entitled to or claiming under" any mortgage.

(LORD CAMPBELL, Ch. J.: Whatever right of entry was in the mortgagee passed to Robert Child by the conveyance.)

Knowles referred to the argument on behalf of the plaintiff in *Doe* d. *Palmer* v. *Eyre* (2).

Chambers and *John Henderson*, *contrà*:

First: If the argument on the other side be correct, Massey was a tenant at will of the land taken in by encroachment; and there has been no notice to determine the will. But the encroachment could not take effect for the benefit of the landlord, as against a

(1) See *Doe* d. *Jones* v. *Williams*, 44 R. R. 421 (5 Ad. & El. 291).

(2) *Ante*, p. 488.

third person. It was pointed out in argument, in *Doe* d. *Lloyd* v. *Jones* (1), that, "in *Doe* d. *Colclough* v. *Mulliner* (2), Lord KENYON ruled, that an encroachment by the tenant on the waste did not belong to his landlord, and is reported to have revolted at the idea that the tenant could make his landlord a trespasser." ALDERSON, B. remarked, in the first-cited case: "The answer to that is, that the presumption may be rebutted by the repudiation of the landlord, as well as by the acts of the tenant." Here the landlord refused altogether to countenance the encroachment. In *Doe* d. *Colclough* v. *Mulliner* (2), the lord was a third person, whose rights could not be affected by anything that took place between the landlord and tenant: so, in the present case, was the mortgagee. In *Doe* d. *Dunraven* v. *Williams* (3), COLERIDGE, J. said: "*Primâ facie*, the law presumes that *every inclosure made by a tenant adjoining [*379] the demised premises was made by him for the benefit of his landlord:" but he added: "and there is no evidence in this case to rebut that presumption." "If you think that the defendant enclosed the land in question, as he has said he did, as being part of the premises comprised in his lease, his possession was not adverse." The question is one of evidence: and here it was not put to the jury to say whether, in fact, the act of encroachment was done for the landlord's benefit.

(LORD CAMPBELL, Ch. J.: We think, as to this point, that the close in question cannot be considered part of the demised premises for the purposes of the Act: and, if it was not, there has been no acknowledgment or payment of rent within twenty years to take the case out of stat. 3 & 4 Will. IV. c. 27, sects. 2, 3.)

Then, secondly, the lessor of the plaintiff is not a person "entitled to or claiming under any mortgage of land" within the meaning of stat. 7 Will. IV. & 1 Vict. c. 28. He claims under a mortgagee, in the sense of tracing title through him, but not under a mortgage. The mortgages in this case were at an end when the term passed to Robert Child.

(LORD CAMPBELL, Ch. J.: The mortgagees were parties to the conveyance; what estate was in them?)

The legal estate.

(1) 71 R. R. 776 (15 M. & W. 584).
(2) 5 R. R. 744 (1 Esp. N. P. C. 460).
(3) 48 R. R. 792, 793 (7 Car. & P. 332, 333).

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(LORD CAMPBELL, Ch. J.: Was not the estate, such as they had, conveyed so as to vest in Child?)

Child became possessed of the original estate under Goodwin's lease to Wilson: the mortgage was immaterial to his right. The statute applies only where there is an existing mortgage at the time of action brought. It was to avoid doubtful questions between actual mortgagors and mortgagees under stat. 3 & 4 Will. IV. c. 27, that
[*380] the later Act was passed. *Sect. 28 of the former statute required a written acknowledgment to bar the mortgagee, but did not expressly make payment of interest sufficient to prevent his being barred. That is remedied by stat. 7 Will. IV. & 1 Vict. c. 28. If the former Act contemplated, as its language shows, the relations of parties under existing mortgages, the latter must be construed as having the same view. The defendant relies on the strict words of the statute, and a clear twenty years' possession. When the payment took place in 1834, his occupation was not interfered with or noticed.

(PATTESON, J.: A mortgagee does not consider who occupies the premises.

LORD CAMPBELL, Ch. J.: No mortgagee throughout England and Wales thinks of troubling himself as to who occupies the premises, if the interest is paid.)

In *Doe* d. *Goody* v. *Carter* (1) it was held that the son's tenancy under the father was not determined when the father mortgaged the premises. The construction now attempted would modify the statutes very seriously. In the case, not uncommon, where by continued non-payment the title is within a few months of being barred, the mortgagor, by a payment of mortgage money, may give himself a new term of twenty years. That was not the intention of the last statute, which was intended for the protection of mortgagees, not of mortgagors. As long as the mortgage subsists, it enures to the ordinary purposes of a mortgage in securing principal and interest; and he in whom it is vested has the statutory and other rights of a mortgagee. But, when it is paid off, the peculiar provision of stat. 7 Will. IV. & 1 Vict. c. 28, is at an end, and stat. 3 & 4 Will. IV. c. 27, again governs.

[381] (ERLE, J.: Do you draw any distinction between the mortgagee

(1) 72 R. R. 472 (9 Q. B. 863).

himself and the assignee of a mortgage? Do you say that, if a mortgagee takes an assignment of the equity of redemption, he thereby loses the twenty years given by stat. 7 Will. IV. & 1 Vict. c. 28?)

Quâ purchaser, he is like any other person.

(ERLE, J.: Very often the mortgagee, when payments get into arrear, finds a purchaser of the mortgage and equity of redemption. You say that, as soon as a fee simple is created, the mortgagee's security is destroyed.)

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered judgment:

This case likewise (1) depends upon the construction of stat. 7 Will. IV. & 1 Vict. c. 28. During the argument we overruled the point, made on behalf of the lessor of the plaintiff, that the bit of ground for which the ejectment was brought must be considered as having been taken and occupied by him as part of the demised premises in respect of which rent was paid; for the conduct of both parties clearly showed the contrary; so that, as against Wilson or any one claiming under him, other than a mortgagee, lapse of time would be a bar.

The real question here is, whether the lessor of the plaintiff can be considered "entitled to or claiming under" a mortgage. He is not a mortgagee, nor the assignee of a subsisting mortgage; the mortgage which Wilson had created in 1822 was paid off in 1834, when the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claims.

Although he is not entitled to the mortgage, we think that he [382] claims under the mortgage. In no other way can the statute be made effectual for the protection of mortgagees. According to the construction we put upon it in *Doe* d. *Palmer* v. *Eyre* (2), the mortgagee might have maintained an ejectment after the expiration of the twenty years, or he might have transferred this right of action by assigning to another who paid him off. But, suppose that the mortgage deed contains a power of sale, may the mortgagee not transfer the same right to a purchaser? Is the purchaser barred by the lapse of time, and may he recover back the purchase money

(1) Judgment was given immediately before in *Doe* d. *Palmer* v. *Eyre*, *ante*, p. 448.

(2) *Ante*, p. 488.

DOE d. BADDELEY v. MASSEY.

which went in satisfaction of the mortgage? If so, the mortgagee who has regularly received payment of his interest may entirely lose his principal from the mortgagor having omitted to receive rent or an acknowledgment from the tenant for twenty years. On payment of the mortgage money the mortgage ceases to exist as a security for money; but the person to whom the mortgagee conveys his legal interest claims under the mortgage, although the equity of redemption should likewise be conveyed to him.

We are therefore of opinion that the lessor of the plaintiff is entitled to our judgment, and that the rule to enter the verdict for the defendant must be discharged.

Rule discharged.

1851. *June* 17.

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ABRAHAM HIRST *v.* JOHN HANNAH.

(17 Q. B. 383—389.)

A warrant of attorney, to confess judgment as a security for advances, was attested in due form by an attorney, acting for defendant and as his attorney, and at his request, but who also acted, in the transaction, for the plaintiff. Defendant was informed that the attorney had been consulted by plaintiff.

The warrant was executed on 6th March, 1847. Judgment was signed on 19th July, 1847; and a *fi. fa.* shortly after issued, but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On 28th June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on 29th July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings was obtained in Trinity Term, 1851:

Held, that, by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 9 (1), the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection, being made, must prevail.

Held, also, that the circumstances above stated did not preclude the assignees of the bankrupt defendant from raising the objection.

Semble, that lapse of time after execution levied, and other circumstances showing that the plaintiff was knowingly allowed to alter his position on the faith of a judgment thus obtained, may preclude the defendant or his representatives from raising the objection. *Sed quære.*

ATHERTON, in this Term, obtained a rule *nisi* to set aside the warrant of attorney and judgment and all ulterior proceedings in this cause. From the affidavits on both sides it appeared that, on 6th March, 1847, the defendant executed a warrant of attorney to confess judgment in the Court of Queen's Bench for 4,000*l.*, with a defeasance stating that the judgment was to be to secure payment of 2,000*l.* by certain instalments, and that no execution was to be issued till default. The warrant of attorney was duly filed;

(1) See now Debtors' Act, 1869 (32 & 33 Vict. c. 62), s. 24.—A. C.

and judgment was entered up on 19th July, 1847. Soon after, default was made in payment of the first instalment; and a writ of *fi. fa.* then issued, but execution was stayed by the plaintiff. On 28th June, 1850, a levy was made, and the goods seized. Hannah, the defendant, was adjudged a bankrupt on 29th July, 1850. HIRST v. HANNAH.

The present rule was obtained, on 28th May, in this Term, on behalf of Hannah's assignees, on the *ground that the warrant of attorney was not duly attested. It was attested by an attorney in due form; but the objection made was that he was at that time the attorney acting for the plaintiff. As to this, the facts appeared to be, that the witnessing attorney was acquainted with both Hirst and Hannah; that Hirst first consulted him as to the kind of security he could have, when he suggested a warrant of attorney; and that, afterwards, Hannah, of his own accord, came to the attorney, and requested him to prepare a warrant of attorney. Hannah now deposed expressly that he employed the attorney as his attorney; that in selecting him he was not influenced by Hirst, but solely by his confidence in an old friend; and that he, and he only, paid the bill of costs; but it was not denied that, besides the previous consultation with Hirst, of which Hannah was informed by the attorney on their first interview, the same attorney received the warrant of attorney from Hannah and kept it for Hirst, and acted as Hirst's attorney in entering up judgment and issuing execution. [*381]

It further appeared that no concealment was practised; that the petitioning creditor, and assignee of Hannah, was aware of the judgment; and that Hirst sold Hannah goods on credit, in the ordinary course of business, after the judgment was signed, which, it was deposed, he would not have done, had he not believed the judgment was a valid security.

Watson, *Cowling* and *Hugh Hill* now showed cause:

The enactment in force on this subject is stat. 1 & 2 Vict. c. 110, s. 9, which enacts that "no warrant of attorney *to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his [*385]

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name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney" (1). Now here the attesting witness is shown by the affidavits to have been retained by Hannah and expressly named by him.

(PATTESON, J.: But he had been in previous communication with Hirst, and advising him on the matter: and, when the warrant of attorney was executed, it was given to him to keep for Hirst. Now in *Sanderson* v. *Westley* (2) it was said by my brother ALDERSON: "Wherever there is but one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney."

ERLE, J.: In the present case it seems clear that the attorney was named by Hannah and was *bonâ fide* acting for Hannah; but it seems also that he was acting as attorney for Hirst.

LORD CAMPBELL, Ch. J.: The question therefore must be whether, consistently with the decided cases, a warrant of attorney so attested is valid.)

In *Walton* v. *Chandler* (3) the warrant of attorney was held valid, though the attesting attorney was in effect but the agent of the plaintiff's attorney.

(PATTESON, J.: The defendant there had the opportunity of consulting a person not engaged for the plaintiff as the attorney here was.

[*386] LORD CAMPBELL, *Ch. J.: You cite the case as if the subscribing witness there was really acting under the plaintiff's attorney, and only nominally the defendant's attorney. But, whatever the facts might be, the COURT in *Walton* v. *Chandler* (3) upheld the warrant of attorney on the ground that they thought the attesting attorney was in fact the attorney of the defendant only.)

In *Haigh* v. *Frost* (4) the facts were exceedingly like the present.

(COLERIDGE, J.: There the decision of the COURT proceeded on the express ground that in fact the attorney was not acting for the plaintiff (5).)

(1) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 24.
(2) 6 M. & W. 98, 100.
(3) 1 C. B. 306.
(4) 7 Dowl. P. C. 743.
(5) See this stated in the judgment, 7 Dowl. P. C. 746.

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At all events, the present applicants cannot be permitted to raise the objection; it has been waived by lapse of time. When a judgment has been signed, and execution has issued, those who come to set aside the judgment and so make all concerned in the execution trespassers by relation ought to do so promptly.

(PATTESON, J.: Can this objection be waived? Is not the effect of the statute to make a warrant of attorney not properly attested a nullity?)

It may be so; and the judgment, founded on it, may be as voidable as if it had been entered up without any authority at all; but the judgment is not void; and the Court do not set it aside unless on the application of some person who has a right to make that application. Now the assignees of the bankrupt in their own time, and the bankrupt to whom they are privy, have knowingly allowed the plaintiff and the sheriff to act on the faith of the judgment; execution has been issued; fresh credit has been given; the parties have altered their position on the faith of this judgment; and the assignees are therefore precluded from taking the objection.

Peacock and *Hall, contrà*, were desired by the COURT to confine their argument to the point whether the assignees of Hannah were, under the circumstances, at liberty to raise the objection: [387]

The objection to a judgment on warrant of attorney, that the warrant was void, cannot be waived: *Gripper* v. *Bristow* (1). In *Pryor* v. *Swaine* (2) the warrant of attorney was set aside five years after it was executed. In *Cocks* v. *Edwards* (3) the judgment was set aside, at the instance of the defendant's assignees, more than a year after the proceeds of an execution levied had been paid to the plaintiff.

(LORD CAMPBELL, Ch. J.: If the objection may be taken, it must prevail; but it is urged against you that the defendant has taken fresh credit on the faith of this judgment, and, after he has done so, it would be against all justice to permit him or those privy to him to take any objection of which he was aware at that time.)

Even in such a case as is supposed, the statute is imperative. For the purpose of preventing frauds, it enacts that no warrant of

(1) 6 M. & W. 807.
(2) 2 Dowl. & L. 37.
(3) 2 Dowl. P. C. (N. S.) 55.

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attorney "shall be of any force" unless the defendant has at the time the advice of an attorney acting on his behalf. It must always be known to the defendant that he has not had this advice; and, in almost every case where the warrant of attorney is to secure a loan, the advance is not made till after the warrant is signed. To establish the rule therefore that a subsequent advance precludes the defendant from taking the objection would make the statute inoperative.

(ERLE, J.: Suppose that a term of years were taken in execution, and the plaintiff, having bought it from the sheriff, proceeded to
[*388] build *upon the premises: do you say that the defendant might wait till 10,000*l.* was spent in improving them, and then come and as a matter of strict law set aside the judgment and execution?)

It is difficult to say that there are not possible cases estopping a defendant from raising the objection; but in the present case there are no advances beyond what had been agreed upon on the treaty for the warrant. The general credit given in the way of business is too remotely connected with the judgment to affect the question.

LORD CAMPBELL, Ch. J.:

I should be unwilling to lay it down that no lapse of time, or fresh dealings between the parties, could preclude the defendant from raising an objection of this sort; but, in the present case, I cannot say it has been so clearly made out that there have been any such fresh dealings, or alteration of the position of the parties on the faith of the judgment, as would warrant us in laying down, for the first time, that the assignees of the defendant are precluded from raising the objection.

Then, they being at liberty to make the objection, and the objection being made, it must prevail. It is clear that, though the attesting attorney was acting for the defendant, he was also acting for the plaintiff.

PATTESON, J.:

I think the words of the Act very clearly show that the attesting attorney must be, not the attorney for the plaintiff, but another person. I think that under no circumstances, and in no case, can the attorney who is acting for the plaintiff be the attorney for the defendant within this statute; and, if a defendant chooses to say
[*389] that he has confidence in the plaintiff's *attorney, and will employ

him and nobody else, he ought to be told that the warrant of attorney would be good for nothing, and that, if he persists, he cannot have the loan or the security.

But in this case it is urged that there were advances after the execution of the warrant of attorney, that there has been a lapse of time since the judgment was signed, and levy made, and that, consequently, the parties are precluded from now raising the objection. And so I should have said if it had not been for the strong words of the Act. But it is very difficult to separate the judgment from the warrant of attorney which the Act says shall be of no force. And, if it may under any circumstances be set up, so as to be of force, I have great difficulty in saying when it is to be set aside.

COLERIDGE, J.:

I also think the rule must be absolute on the ground that a statute intended to prevent frauds, by requiring formalities, must be strictly observed or it is of no avail.

ERLE, J.:

I fear that formal provisions intended by the Legislature to protect persons from frauds are too often perverted to an opposite purpose. But I am not prepared at present to lay down any rule, the application of which to the facts of the present case would prevent the parties before us from raising this objection.

Rule absolute.

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1851.
April 25.
June 17.

(17 Q. B. 390—422; S. C. 20 L. J. Q. B. 507; 15 Jur. 1170; (in equity) 4 De G. & Sm. 538.)

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By settlement on the marriage of J. T. and Isabella afterwards his wife, a moiety of certain lands was conveyed to trustees, to the use of J. T. and his assigns for his life; remainder to the use of Isabella and her assigns for her life; remainder to the use of the first and other sons of J. T. by Isabella successively in tail male; remainder to the use of the daughters of J. T. by Isabella as tenants in common in tail general, with cross remainders between them; remainder to the use of the settlor, A. the father of Isabella, his heirs and assigns for ever. J. T. was seised in fee of the other moiety.

By indentures executed after the marriage, in 1815, to which J. T., his said wife, and J. C. T. his eldest son (then of age) were parties, the settled moiety was conveyed to a tenant for the purpose of suffering a recovery, and the unsettled moiety, with other lands of which J. T. was seised in fee, were conveyed to trustees and their heirs: and the uses of the respective conveyances were declared as follows:

As to the first mentioned moiety, to the use of J. C. T. and his heirs during the life of J. T.; remainder to the use of Isabella and her assigns

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for her life: and, as to the same moiety after the determination of the life estates, and also as to the moiety and lands secondly above mentioned from and immediately after the execution of this conveyance, to the use of J. C. T. and his assigns for his life, remainder to the use of the first and other sons of J. C. T. successively in tail male; remainder to the use of E. T. the younger son of J. T. and his assigns for his life; remainder to the use of the first and other sons of the same E. T. successively in tail male: remainder to the use of the first and other sons thereafter to be born to J. T. by Isabella or any future wife successively in tail male; remainder to the use of M., the only daughter of T., and her assigns for her life; remainder to the use of the first and other sons of M. successively in tail male; remainder to the use of the first and other daughters thereafter to be born to J. T. by his then present or any future wife successively in tail male; remainder to the use of the first and other sons of the body of J. C. T. successively in tail general; remainder to the use of the first and other sons thereafter to be born of the body of J. T. by his then present or any future wife successively in tail general; remainder to the use of the first and other sons of the body of M. (the then only daughter) successively in tail general; remainder to the use of the first and other daughters to be born of the body of J. T. by his then present or any future wife, successively in tail general; remainder to the use of J. T. in fee. The recovery was suffered; A. B. being demandant, C. D. tenant, and Isabella and J. C. T. vouchees, who vouched the common vouchee.

J. T. was a trader, within the bankrupt laws, and executed the conveyances of 1815 with intent to delay and defraud his creditors: but J. C. T., his son, was not privy to that intention. J. T. became bankrupt; and his assignees filed a bill in equity to set aside the deeds of 1815, and the recovery; and a decree was made, declaring the same void as against the creditors, and the assignees entitled to the lands; it was also ordered that the indentures should be given up to the assignees to be cancelled, which was done.

The assignees afterwards agreed to sell their interest in J. T.'s estates to J. C. T.: and by indentures of July, 1821, made for the purpose of barring all estates tail, remainders &c. in and expectant on the first mentioned moiety, and for limiting the same as after mentioned, J. C. T., and the assignees, at the request and for the accommodation of J. C. T., bargained, sold and released &c. the first mentioned moiety to C. D., in order that he might be tenant to and suffer a recovery, which was declared to enure to the use of the assignees during the life of J. T. the father, and, from and after his decease, to the use of J. C. T. in fee; the release to be void on non-payment of purchase-money by J. C. T. The recovery was suffered accordingly, J. C. T. being vouchee. And afterwards, by indentures of March, 1823, reciting payment of the said purchase-money, the assignees bargained, sold and released &c. to J. C. T. the life estate of J. T. in the first mentioned moiety, and the fee simple in the other moiety.

Afterwards, J. T. and his wife died; and J. C. T. sold, and, in 1849, conveyed by deed, the fee simple of the entirety to a purchaser for value.

On a case stated for the opinion of this Court, whether the eldest son of J. C. T. had any and what estate or interest in the first mentioned moiety: Held:

That the deed of 1815 was made by J. T. without consideration, and was fraudulent and void as against creditors by stat. 13 Eliz. c. 5, and that nothing passed by it to J. C. T.

That, J. C. T. being a party to the recovery, its operation as to him was not preserved by stat. 13 Eliz. c. 5, s. 4. But that it barred the estates of

the younger brother of J. C. T., his sister, and the original settlor, they being persons having remainder or reversion within sect. 4.

That, if the release of 1815 was, under these circumstances, wholly vitiated, the recovery of 1815 operated, not to the former uses, but as a simple recovery without any deed to lead uses: and that J. C. T. thereupon became tenant in fee; and that, even if he had continued tenant in tail, his estate became a fee simple by the recovery and deeds of 1821 and 1823, and, consequently, his eldest son had now no interest.

That, whatever order might have been made by the Court of Chancery if J. C. T. had interposed to prevent the deed of 1815 (to lead uses) from being entirely cancelled, the recovery, as the case now stood, enured to the use of J. T. for life (which interest passed to his assignees), with remainder to J. C. T. in fee; all the uses declared by the deed of 1815 being void. And

That, even if, under that deed, J. C. T. had become tenant for life in remainder with remainder to his first son in tail, yet the conveyance by that deed was a voluntary conveyance within stat. 27 Eliz. c. 4 (1); and void (notwithstanding the recovery in 1821) as against a purchaser for value; and that, on the conveyance to such a purchaser in 1849, the interest of J. C. T., having become by the recovery of 1815 (for want of a deed to lead uses) a fee simple interest, was, by the conveyance of 1849, transferred to the purchaser.

VICE-CHANCELLOR SIR J. L. K. BRUCE sent the following case for the opinion of this COURT:

By indenture dated the 30th day of September, 1790, and made [391] between, and executed by, Alexander Collingwood of Unthank in the county of Northumberland, Esq., and Isabella Collingwood, spinster, second daughter of the said A. Collingwood by Margaret his wife, of the first part, John Tarleton of Liverpool, Esq. of the second part, and Clayton Tarleton of Liverpool, Esq. and Thomas Collingwood of Gray's Inn, Esq., of the third part, one undivided moiety of a manor and hereditaments in the county of Northumberland, therein particularly described, and hereinafter called "The Collingwood Estates," was conveyed and assured unto the said Clayton Tarleton and Thomas Collingwood and their heirs, To the use of the said Alexander Collingwood, his heirs and assigns, until a marriage then intended between the said John Tarleton and Isabella Collingwood was duly had and solemnized; and, after the solemnization thereof, To *the use of the said John Tarleton and [*392] his assigns for his life without impeachment of waste, with remainder to the use of the said C. Tarleton and T. Collingwood and their heirs during the life of the said John Tarleton, upon trust to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed; with remainder to the use of the said Isabella Collingwood and her assigns for her life; with

(1) See now Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).—A. C.

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remainder to the use of the said C. Tarleton and T. Collingwood and their heirs during the life of the said Isabella Collingwood (as before, to preserve contingent uses &c.); with remainder to the use of the first and other sons of the said John Tarleton by the said Isabella his then intended wife successively in tail male; with remainder to the use of the daughters of the said John Tarleton by the said Isabella his wife as tenants in common in tail general with cross remainders between them; with remainder to the use of the said Alexander Collingwood, his heirs and assigns for ever.

The marriage between the said John Tarleton and Isabella Collingwood was duly had and solemnized; and there was issue of the said marriage, John Collingwood Tarleton the eldest son, and other children. The said John Collingwood Tarleton attained the age of twenty-one years before the 18th day of March, 1815.

At the time of the execution of the indentures of the 17th and 18th days of March, 1815, hereinafter stated, the said John Tarleton was seized to him and his heirs for an estate of inheritance in fee simple of and in the other moiety of the said Collingwood estates, and also of and in the entirety of certain estates called the Ingram estates.

By indenture of bargain and sale, dated the 18th day of March, [*393] 1815, duly enrolled &c. (in the Common *Pleas, as of Easter Term, 55 Geo. III.), made between the said John Tarleton and Isabella his wife of the first part, the said John Collingwood Tarleton of the second part, William Ainge of the third part, and Robert Blake of the fourth part, the said John Tarleton and Isabella his wife and the said John Collingwood Tarleton did grant, bargain, sell, ratify and confirm unto the said William Ainge and his heirs the said undivided moiety comprised in the said indenture of settlement of the 30th day of September, 1790, of and in the said Collingwood estates, To hold the same unto and to the use of the said W. Ainge, his heirs and assigns for ever, to the intent &c. (that Ainge might become tenant of the freehold of the said moiety for the purpose of suffering a recovery &c.; Robert Blake to be demandant, William Ainge tenant, and Isabella Tarleton and J. C. Tarleton vouchees): which recovery when suffered it was thereby declared &c. (declaration that it should enure to such uses, upon such trusts, intents and purposes, and with, and subject to such powers, provisoes, &c. as were or should be expressed by the indenture of 18th March, 1815, next stated).

By indentures of lease and release dated respectively the 17th

and 18th days of March, 1815, the release being made between the said John Tarleton and Isabella his wife and the said John Collingwood Tarleton of the first part, the said John Tarleton of the second part, William Richard Cosway and Edward Thurlow of the third part, and Edward Houghton and William Ainge of the fourth part, after reciting the said indenture of bargain and sale of even date with the now stating indenture, and reciting that the said John Tarleton, Isabella his wife, and John Collingwood Tarleton, were severally desirous *of declaring the uses of the said undivided moiety intended to be comprised in and conveyed by the aforesaid indenture of bargain and sale and the said common recovery to be suffered in pursuance thereof as aforesaid, and that the said John Tarleton was desirous of conveying, settling and assuring the said hereditaments of or to which he was seized or entitled for an estate of inheritance in fee simple to the uses and upon the trusts hereinafter expressed and declared of and concerning the same premises respectively, It was witnessed that, for effectuating such intent and purpose as aforesaid, and for divers other good and valuable causes and considerations, and for the nominal consideration therein mentioned, he the said John Tarleton did grant, bargain, sell, alien, release and confirm unto the said W. R. Cosway and E. Thurlow, and their heirs, all that the said undivided moiety or equal half part or share of him the said John Tarleton of and in the said Collingwood estates and hereditaments, and also the entirety of the said Ingram estates and hereditaments, To hold the same unto the said W. R. Cosway and E. Thurlow, their heirs and assigns, to the uses and upon the trusts thereinafter expressed and declared of and concerning the same: and it was further expressed, agreed and declared, by and between the said parties thereto, that the said undivided moiety of the said Collingwood estates and hereditaments comprised in and conveyed by the aforesaid indenture of bargain and sale of even date therewith should be and remain, and that the same bargain and sale and the said recovery to be suffered as aforesaid should operate and enure, and also that the grant and release thereinbefore contained should severally operate and enure, to the uses and upon the trusts hereinafter *expressed and declared of and concerning the same premises respectively, viz.: As to the said undivided moiety of the said Collingwood estates comprised in and intended to be conveyed by the aforesaid indenture of bargain and sale and recovery to be suffered in pursuance thereof as aforesaid, To the use of the said

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John Collingwood Tarleton and his heirs during the life of the said John Tarleton for the only proper use and benefit of him the said J. C. Tarleton and his heirs, with remainder to the use of the said Isabella Tarleton and her assigns for life without impeachment of waste: And as to the said undivided moiety of the said Collingwood estates comprised in the said indenture of bargain and sale, from and after the determination, and subject to the uses and trusts thereinbefore declared thereof, and also as to the other undivided moiety of the same estates and as to the entirety of the said Ingram estates, from and immediately after the execution of the now stating indenture, To the use of the said J. C. Tarleton and his assigns for his life without impeachment of waste; with remainder to the use of the said W. R. Cosway and E. Thurlow and their heirs during the life of the said J. C. Tarleton, in trust to preserve contingent remainders; with remainder to the use of the first and other sons of the said J. C. Tarleton successively in tail male; with remainder to the use of Edward Thomas Tarleton, the younger son of the said John Tarleton, and his assigns, for his life, without impeachment of waste; with remainder (to trustees, as before, during the life of Edward Thomas Tarleton, to preserve contingent remainders); with remainder to the use of the first and other sons of the said Edward Thomas Tarleton successively in tail male; with remainder to the use of the first and other sons
[*396] thereafter *to be born to the said John Tarleton by the said Isabella his then present or any future wife successively in tail male; with remainder to the use of Margaret Anne Tarleton, spinster, the only daughter of the said John Tarleton, and her assigns for her life without impeachment of waste; with remainder (to trustees, as before, during the life of Margaret Anne Tarleton to preserve contingent remainders); with remainder to the use of the first and other sons of the said Margaret Anne Tarleton successively in tail male; with remainder to the use of the first and other daughters thereafter to be born to the said John Tarleton by the said Isabella or any future wife, successively in tail male; with remainder to the use of the first and other sons of the body of the said John Collingwood Tarleton successively in tail general; with remainder to the use of the first and other sons thereafter to be born of the body of the said John Tarleton by his said present or any future taken wife, successively in tail general; with remainder to the use of the first and other sons of the body of the said Margaret Anne Tarleton successively in tail general; with remainder to the use of

the first and other daughters to be born of the body of the said John Tarleton by his then or any after taken wife, successively in tail general; with remainder to the use of the said John Tarleton, his heirs and assigns for ever.

A recovery was suffered of the said moiety of the said Collingwood estates comprised in the said settlement of the 30th day of September, 1790 (Easter Term, 55 Geo. III.); and therein the said R. Blake was demandant, the said W. Ainge tenant, and the said Isabella Tarleton and J. C. Tarleton were vouchees, who vouched over the common vouchee.

The said John Tarleton was, in and previously to the month of March, 1815, and at the time of the execution of the said several indentures of bargain and sale of the 18th March, 1815, and indentures of lease and release of the 17th and 18th March, 1815, indebted to various persons, and a trader subject to the bankrupt laws: and the said several indentures bearing date the 17th and 18th March, 1815, were made and executed, and the said common recovery was suffered, with the intent on the part of the said John Tarleton thereby to delay, hinder and defraud the creditors of the said John Tarleton in their lawful actions against him, and in the recovery of their debts from him: but the said John Collingwood Tarleton was not party or privy to such intent, but believed and supposed that the said deeds were intended for another and a different object, and not for the purpose of defeating or delaying the creditors of the said John Tarleton. [397]

The case then stated that a commission of bankrupt, under the Great Seal, dated 22nd June, 1815, was issued against John Tarleton, directed &c., and that, under such commission, John Tarleton was duly found and declared a bankrupt; and certain assignees were appointed, to whom the Commissioners assigned (on July 11th, 1816) all the lands, tenements and hereditaments &c. whereof John Tarleton at the time he became bankrupt, or since, had any estate, right, title or interest, *habendum* to the use of the assignees, their heirs and assigns, subject to mortgages, charges &c., if any, in trust &c. (for themselves and all other the creditors of J. T. seeking relief under the commission).

The case then stated that the assignees (one of those first named having died and another being substituted) filed *their bill of complaint in the High Court of Chancery against the said John Collingwood Tarleton and the said John Tarleton and Isabella his wife, Edward Thomas Tarleton, Margaret Anne Tarleton (then out [*398]

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of the jurisdiction of the Court), William Ainge, Robert Blake, William Richard Cosway (then out of the jurisdiction of the Court), Edward Thurlow, Edward Houghton and Edward Falkner, as defendants thereto, in order to set aside the said several deeds of the 17th and 18th days of March, 1815, and the said common recovery, as void against the creditors of the said John Tarleton. And, by the decree made on the hearing of the said cause on the 2nd day of July, 1819, by the then MASTER OF THE ROLLS, it was, among other things, ordered that the parties should proceed to a trial at law in his Majesty's Court of King's Bench, at the next Assizes to be holden in and for the County Palatine of Lancaster, on one or more issue or issues to try the validity of the said indenture of bargain and sale bearing date the 18th day of March, 1815, and the said recovery suffered in pursuance thereof, and also of the said indentures of lease and release dated respectively the 17th and 18th days of the said month of March, 1815: in which said issue or issues the said James Barnes, John Hornby and Benjamin Rolfe (J. Tarleton's assignees) were to be plaintiffs, and the said J. C. Tarleton, W. Ainge, R. Blake, E. Thurlow, E. Houghton and E. Falkner were to be defendants.

In pursuance of the said decree, the said parties proceeded to a trial of the said issue at the Summer Assizes for the County Palatine of Lancaster in the year 1819; when the jury impannelled to try such issue found that the said several deeds, conveyances
[*399] *and recovery were, and each of them was, void and fraudulent in the law as against the creditors of the said John Tarleton.

The said cause came on to be heard again before the Master of the Rolls on the 16th day of December, 1819; when it was decreed that the said indenture of bargain and sale dated the 18th day of March, 1815, and the recovery suffered in pursuance thereof, and also the said indentures of lease and release dated respectively the 17th and 18th days of March, 1815, were fraudulent and void as against the creditors of the said John Tarleton the bankrupt, and the plaintiffs in the said cause as the assignees of his estate and effects, and that the said plaintiffs were entitled to have possession of the premises comprised in the said several indentures delivered up to them. A further order was made in the said cause on the 12th day of March, 1821, whereby it was ordered that the said several indentures should be delivered up to the said assignees to be cancelled. The said several indentures were, in pursuance of the said order, delivered up to the said assignees, and were cancelled.

The said assignees of the said John Tarleton subsequently, with the consent of the LORD CHANCELLOR sitting in bankruptcy, agreed to sell their interest in the said Collingwood estates to the said John Collingwood Tarleton for the sum of 30,000*l.*, which was paid to them by the said J. C. Tarleton.

By indentures of lease and release dated the 5th and 6th days of July, 1821, the release being made between the said J. Hornby, &c. (the assignees), of the first part, the said J. C. Tarleton of the second part, the said William Ainge of the third part, and *Edgar Taylor [*400] of the fourth part: It was witnessed that, for barring and destroying all estates tail and all remainders and reversions thereupon expectant or depending of and in the moiety or half part or share thereby released of and in the hereditaments thereinafter described, and for limiting and settling the said moiety or half part or share in the manner thereinafter mentioned, and for the nominal consideration therein mentioned, they the said &c. (the assignees) at the request and by the direction and for the accommodation of the said John Collingwood Tarleton, testified by his being a party to and executing the now stating indenture, did, and each of them did, bargain, sell, alien, release and confirm, and the said J. C. Tarleton did grant, bargain, sell, alien, release and confirm, unto the said William Ainge and to his heirs and assigns, during the life of the said John Tarleton, the said moiety of the said Collingwood estates comprised in the said indenture of settlement of the 30th day of September, 1790; To hold the same unto the said William Ainge and his heirs during the life of the said John Tarleton to the use of the said W. Ainge and his heirs and assigns during the life of the said John Tarleton, to the intent that the said W. Ainge might become perfect tenant of the freehold of the said undivided moiety or half part or share of and in the said hereditaments, against whom one or more good and common recovery or common recoveries might be had and suffered thereof in such manner as thereinafter mentioned: and it was thereby declared that the said common recovery and all other common recoveries, fine and fines, should be and enure to the use of the said J. Hornby, &c. (the assignees), their heirs and assigns, *during the natural life of the said John [*401] Tarleton the father, and, from and after the decease of the said J. Tarleton the father, to the use of the said J. C. Tarleton his heirs and assigns for ever and to and for no other use, intent or purpose whatsoever; and it was thereby declared &c. (declaration that, if J. C. Tarleton, his heirs, executors &c. should not pay the

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assignees, or their assigns, the sum of 30,000*l.* on or before 6th of January then next, the release or other assurance by those presents made by the assignees should determine and be void, and it should be lawful for them to enter upon and hold the said undivided moiety thereby released, in their former estate).

In pursuance of the said indenture, a recovery was suffered (Trinity Term, 2 Geo. IV.), wherein the said Edgar Taylor was demandant, the said William Ainge tenant, and the said John Collingwood Tarleton vouchee, who vouched over the common vouchee, of the said moiety of the said Collingwood estates and hereditaments.

By indentures of lease and release dated respectively the 6th and 7th days of March, 1823, the release being made between the said J. Barnes, &c. (the assignees), of the first part, Ambrose Lace of the second part, and the said John Collingwood Tarleton of the third part, reciting that the said J. Barnes, &c. (with the consent and approbation of the creditors of the said John Tarleton duly convened for that purpose) contracted and agreed with the said J. C. Tarleton for the absolute sale to him the said J. C. Tarleton, at the clear price and sum of 30,000*l.*, of the said life estate of the said John Tarleton in one moiety, and the fee simple in possession of the other moiety, of the said Collingwood estates, and all other
[*402] the estate, right, title or interest *of him the said John Tarleton in or to the same: It was witnessed that, in pursuance of the said agreement, and in consideration of 30,000*l.*, paid by the said J. C. Tarleton to the said J. Barnes, &c. (the assignees), they the said J. Barnes, &c. did, and each of them did, bargain, sell, alien, release and confirm unto the said J. C. Tarleton and to his heirs and assigns, for and during the natural life of the said John Tarleton, all that undivided moiety in and by the said indenture of settlement of the 30th day of September, 1790, granted and conveyed of and in the said Collingwood estates, to hold the same unto and to the use of the said J. C. Tarleton, his heirs and assigns, for and during the life of the said John Tarleton: and it was further witnessed that, in further pursuance of the said agreement, and for the considerations aforesaid, the said J. Barnes, &c. (the assignees) did bargain, sell, alien, release and confirm unto the said J. C. Tarleton and to his heirs and assigns, all that the other undivided moiety of the same estates, to hold the same unto the said J. C. Tarleton and his heirs to the use of the said J. C. Tarleton his heirs and assigns absolutely and for ever.

The said John Tarleton and Isabella his wife died before the year 1843.

The said John Collingwood Tarleton has lately sold the fee simple and inheritance of the entirety of the said Collingwood estates to the said defendant Henry Thomas Liddell for a large sum of money, which has been paid to him by the said Henry Thomas Liddell: and, by indentures duly executed, and dated the 1st day of April, 1849, and made between the said J. C. Tarleton of the one part and the said H. T. Liddell of the other part, *the said [*403] J. C. Tarleton, in consideration of such sum of money, has conveyed and assured the entirety of the said Collingwood estates unto and to the use of the said H. T. Liddell, his heirs and assigns for ever.

All the property of the said John Tarleton has been got in and disposed of under his bankruptcy: and the proceeds thereof have been applied in payment of his debts proved under the said bankruptcy, and have been insufficient for the payment of such debts in full.

The plaintiff Banastre Tarleton is the eldest son of the said John Collingwood Tarleton.

Either of the parties is at liberty to refer to any of the deeds or documents stated in this case, which are to be considered as though they had been set forth at full length.

The question for the opinion of the Court is, Whether the plaintiff Banastre Tarleton has any and what estate or interest in the moiety of the said Collingwood estates comprised in the said indenture of settlement of the 30th day of September, 1790.

The case was argued in last Term (1).

Peacock, for the plaintiff:

First. The conveyance by John Tarleton of 17th and 18th March, 1815, was not void as against creditors within stat. 13 Eliz. c. 5. J. C. Tarleton, the son, gave up his estate tail in the settled moiety of the Collingwood estates, and acquired, in return, his father's life estate in that moiety, together with a life estate to himself in all the estates. The transaction was a purchase by the father of part of his son's estate under the settlement for a consideration; the adequacy *of the consideration cannot be measured; it was not [*404] merely colourable, and is sufficient as against creditors: *Roe* d.

(1) April 25th. Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

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Hamerton v. *Mitton* (1). The son was not cognizant of his father's debts when he executed the deeds.

(LORD CAMPBELL, Ch. J.: Were not these matters decided by the equity suit and action at law?)

J. C. Tarleton was no party to those. If the conveyance here had been a bill of sale of goods, it would have been valid, as having consideration to support it, though there was an intention to defeat creditors: *Holbird* v. *Anderson* (2); *Pickstock* v. *Lyster* (3); *Wood* v. *Dixie* (4). No distinction can be drawn, on this point, between real estate and chattels: and goods transferred by bill of sale could not be recovered back merely because the vendor had sold them knowing that he should become bankrupt, and had spent the money.

(LORD CAMPBELL, Ch. J.: However small the consideration for the sale?)

Unless it were so small as to prove collusion with the purchaser, that would make no difference. Here, collusion on the part of J. C. Tarleton is negatived. It is true that the creditors gain no benefit: but that would equally have been the case if the consideration had been marriage.

(LORD CAMPBELL, Ch. J.: They not only gain nothing, but they lose the Ingram estates and the unsettled half of the Collingwood estates. And the father, John Tarleton, obtains no real *quid pro quo*.)

He gets a resettlement of his estate.

(LORD CAMPBELL, Ch. J.: Only a change in his own marriage settlement, leaving the uses not essentially altered.)

Even the surrender by J. C. Tarleton of his own estate tail is a consideration as against creditors.

[*405] (LORD CAMPBELL, Ch. J.: He probably thought he *was bettering his own position.)

PATTESON, J.: If this conveyance was void against creditors, it is

(1) 2 Wils. 356.
(2) 5 T. R. 235.
(3) 16 R. R. 300 (3 M. & S. 371).
(4) 68 R. R. 590 (7 Q. B. 892).

void against the purchasers from J. C. Tarleton. You are seeking to upset all the proceedings which have taken place in the twenty-one years since the decree in Chancery.

LORD CAMPBELL, Ch. J.: Did the VICE-CHANCELLOR, in sending this case, intend us to consider whether the decree in Chancery was void? Unless he wished it, I think we ought not.

W. T. S. Daniel, with *Peacock*, stated that the objection, before the Vice-Chancellor, was to the plaintiff's title generally, and that the case was not stated with a view to any one question in particular, though the principal dispute was, supposing the conveyance to have been void as against creditors, what the consequence would be.

J. V. Prior, with *Crompton*, *contrà*, said that the case had not been fully argued when referred to this Court by the VICE-CHANCELLOR.)

The plaintiff is entitled to contend that the view on which the decree of 1819 was grounded is incorrect.

(PATTESON, J.: Your argument suggests a very easy mode of defrauding creditors, by conveying a man's life estate to his son, the son being ignorant of the design.

LORD CAMPBELL, Ch. J.: And the conveyance being made on any consideration, however slight.)

Secondly, assuming the father's deed to have been ineffectual as against his creditors, the recovery operated, as against them, to all the uses except those which affected the estate of the father: that is to say, his life estate would be subject to the claim of his creditors, but the recovery would take effect to the uses declared by J. C. Tarleton, and the remainders limited by his deed would be valid under stat. 13 Eliz. c. 5, s. 4, which is introduced expressly to protect recoveries. *Otherwise, if a recovery were suffered under [*406] circumstances like the present, the son wishing to cut off the estate tail, and joining in the recovery for that purpose, the creditors might prevent the son from taking the fee. The recovery here was valid in law: the conveyance is void by the statute, as against the creditors only. An *elegit* sued out by them could have operated only on John Tarleton's estate: it could not have affected the estate tail limited to the son. Nor could the cancellation of the deed devest that estate. The decision in the equity suit, to which the now plaintiff was no party, cannot bind him here: *Nathan* v.

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Giles (1). But, supposing the recovery void, still the grandson, the now plaintiff, has the estate tail. His father, J. C. Tarleton, was tenant in tail, and might, by his deed of 1815, convey a base fee, subject to be devested by entry of the issue in tail: *Machell* v. *Clarke* (2), *Doe* d. *Daniel* v. *Woodroffe* (3). And, here, the issue in tail does not enter, but is the very person who takes the estate tail through J. C. Tarleton under this conveyance.

(PATTESON, J.: If there has been no valid recovery, he will be in by remitter, and not under his father's deed.)

The remitter, at ny rate, does not take effect during J. C. Tarleton's life. And, whether the plaintiff be remitted, or in of a new estate, he is, at all events, in by a legal title.

Thirdly, the question is, whether the settlement of 1815 is void as against a subsequent purchaser from J. C. Tarleton, by stat. [*407] 27 Eliz. c. 4. A conveyance, to *be void under that Act, must be purely and entirely voluntary, and must have that character at the time when it is executed. If there was any consideration, it is not voluntary within the statute: and this is consistent with the law laid down in *Doe* d. *Otley* v. *Manning* (4). Now, in the present case, when the conveyance of 1815 was executed, there was clearly some consideration to the son, J. C. Tarleton, who is expressly found to have been unacquainted with the fraud. There would have been no question as to this if John Tarleton had not had creditors. It would be very dangerous to hold, upon strict views as to consideration, that a re-settlement of estates between father and son was void against subsequent purchasers from the son. Almost every re-settlement of this kind might be found voluntary, if the question were raised. Assuming that there was consideration at the time of the conveyance, it is not vitiated by a failure of the consideration afterwards; as by eviction. And, supposing that the recovery was originally good, J. C. Tarleton could not defeat it by his own subsequent sale. He himself could not have disturbed the re-settlement: can he place a purchaser in a better situation than his own?

(1) 15 R. R. 581 (5 Taunt. 558).

(2) 2 Ld. Ray. 778.

(3) 81 R. R. 401 (2 H. L. C. 811), affirming the judgment of the Exchequer Chamber in *Woodroffe* v. *Doe* d. *Daniel*, 15 M. & W. 769, which reversed (in part only) the judgment of the Court of Exchequer in *Doe* d. *Daniel* v. *Woodroffe*, 10 M. & W. 608.

(4) 9 R. R. 503 (9 East, 59).

(ERLE, J.: The question is, whether John Tarleton received a good *bonâ fide* consideration for the conveyance made to J. C. Tarleton in 1815; it being found that that conveyance was voluntarily made, for the purpose of defeating creditors.) TARLETON v. LIDDELL.

Crompton, contrà, was stopped by the COURT as to the first point:

As to the second: Supposing Liddell, the subsequent purchaser, to be out of the question, no *estate could pass to the plaintiff [*408] under the conveyance of 1815, which has been expressly found by verdict to be fraudulent on the part of John Tarleton, and declared void on that ground by a decree, which was followed up by an order for cancelling the indentures. Had any estate passed by the deeds, the MASTER OF THE ROLLS would have directed a re-conveyance, not a cancellation. But, supposing that some estate (as a base fee) passed at the time of conveyance, yet, the conveyance being without consideration and so fraudulent within stat. 13 Eliz. c. 5, it becomes void when the creditors come in to impeach it, and is so for all purposes, and as to all persons; the law then considers that there was not a good estate at any time, even before the creditors interfered. The same principle was recognised in the case of sale of a chattel, when the sale was avoided by reason of fraud, in *Murray* v. *Mann* (1).

(ERLE, J. mentioned sect. 4 of stat. 13 Eliz. c. 5.)

That is designed to protect tenants in tail who have an interest in the entail being cut off; not to qualify the operation of the Act as to persons under mercantile liabilities. This Court has held, where a lease was expressly surrendered in consideration of having a new lease, and the new lease proved to be a bad execution of a power, that the surrender was inoperative; and this although the new lease was not absolutely void but voidable only: *Doe* d. *Earl of Egremont* v. *Courtenay* (2). And, as to the supposition of a base fee passing, it is said in *Roe* d. *Earl of Berkeley* v. *Archbishop of York* (3) (referred to in the last-cited case): "There is no case or authority which says, that if a conveyance *cannot [*409] operate 'in the way intended' to pass the estate intended, that it shall operate in another way to pass an estate, which was not intended, and not within the contemplation of the parties. 'And

(1) 76 R. R. 686 (2 Ex. 538, 541).
(2) 75 R. R. 600 (11 Q. B. 702).
(3) 8 R. R. 413 (6 East, 86, 106).

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though the manner of passing an estate is not to be regarded;' yet, 'the intent is to be regarded, what estate is to pass, and to whom?'. And so it is laid down by Lord Ch. J. WILLES in his Report, 687" (1). *Onions* v. *Tyrer* (2), as to the effect of a will intended to revoke a prior will and substitute new provisions, but imperfectly executed, bears some analogy to this case. It being, then, impossible, in the present case, that the uses could take effect as intended, the conveyance effects nothing. At most, assuming that something passed, the uses would result back.

As to the third point: *Doe* d. *Otley* v. *Manning* (3) fully recognizes the doctrine, laid down in *Lord Townshend* v. *Windham* (4), that, under stat. 27 Eliz. c. 4, every voluntary conveyance is void, where there is a subsequent conveyance for value, even though there be "no fraud in that voluntary conveyance, nor the person making it at all indebted." It makes no difference that the purchaser knew of the fraudulent conveyance: *Gooch's* case (5). In *Roe* d. *Hamerton* v. *Mitton* (6) there was abundant consideration. The present case does not at all resemble those of conveyances by way of marriage settlement: but, even in those, the conveyance has not been held good as against subsequent purchasers, where it did not carry out the bargain upon which the settlement was based, but did something which the conveying party was not bound to do: *Doe* *d. *Barnes* v. *Rowe* (7); though he probably acted in the belief that he was fulfilling an obligation. And, in a marriage settlement, a remainder to the settlor's brother has been held void under the statute, as against a purchaser: *Johnson* v. *Legard* (8); though a limitation in such a settlement to the issue which the settlor might have by a future marriage had been held valid in *Clayton* v. *Earl of Wilton* (9). A limitation in a marriage settlement of an estate, the property of the wife, to her brothers and sisters, was held void under the statute, in *Cotterell* v. *Homer* (10). The distinctions are nice; but the principle is that the settlement, to prevail against the statute, must be grounded upon some consideration beneficial to the settlor, and not merely on the desire of benefiting or assisting the person in whose favour the provision is made. The concurrence of such

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(1) *Roe* d. *Wilkinson* v. *Tranmarr*, Willes, 682.
(2) 1 P. Wms. 343.
(3) 9 R. R. 503 (9 East, 59).
(4) 2 Ves. Sen. 1, 10.
(5) 5 Co. Rep. 60 a.
(6) 2 Wils. 356.
(7) 4 Bing. N. C. 737.
(8) 18 R. R. 301 (6 M. & S. 60).
(9) 18 R. R. 307 (6 M. & S. 67, n.).
(10) 60 R. R. 387 (13 Sim. 506).

person (being a necessary party) in the settlement is not sufficient, unless such concurrence was made matter of bargain with the settlor: *Doe* d. *Baverstock* v. *Rolfe* (1), where *Goodright* d. *Humphreys* v. *Moses* (2) and other cases are cited. To create a valuable consideration, the party joining must relinquish something, and not virtually take back all he gave: *Russel* v. *Hammond* (3); which, with *Goodright* d. *Humphreys* v. *Moses* (2), is commented upon in Roberts on Fraudulent Conveyances, pp. 271—274.

Peacock, in reply:

No decision has laid it down that, in a case of mutual conveyances, a defect in the title on one side, by which the title is subsequently prejudiced, *annuls the conveyance on the other. [*411] The case is different from that of exchanges. The decision in *Doe* d. *Earl of Egremont* v. *Courtenay* (4) applies strictly to the case of lease and surrender: if nothing was really taken out of the reversion in granting the supposed new lease, the old lease was not merged. *Doe* d. *Baverstock* v. *Rolfe* (5) decided only that a settlement, otherwise voluntary, was not made valid by the concurrence of certain parties. *Goodright* d. *Humphreys* v. *Moses* (2) was simply a case of no consideration, and not at all similar to the present. The Court will not extend the doctrine of voluntary conveyance farther than it was carried in *Doe* d. *Otley* v. *Manning* (6). If the present transaction is invalidated, it is so simply by the statutory provision of 13 Eliz. c. 5, and not by relation to any other act done, as in bankruptcy. Supposing the bankrupt laws out of the question, John Tarleton, if he had not conveyed, would have been entitled to the rents and profits of the estate till the creditors sued out an *elegit*; and then he could not have been called upon to refund what he had taken. A person to whom he conveys is in the same situation. The transaction is not affected, under the statute of Elizabeth, by relation back to any other act, as in bankruptcy. And, supposing that the conveyance of 1815 were in question as an act of bankruptcy, no such relation is established; since nothing appears as to the debt of the petitioning creditor, from whom the other creditors, and the assignees, derive their rights under the commission: *Tope* v. *Hockin* (7).

Cur. adv. vult.

(1) 47 R. R. 687 (8 Ad. & El. 650, 672).
(2) 2 W. Bl. 1019.
(3) 1 Atk. 13, 16.
(4) 75 R. R. 600 (11 Q. B. 702).
(5) 47 R. R. 687 (8 Ad. & El. 650).
(6) 9 R. R. 503 (9 East, 59).
(7) 7 B. & C. 101.

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LORD CAMPBELL, Ch. J. now delivered the judgment of the COURT.

[412] The question in this case being, whether the plaintiff, Banastre Tarleton, an infant, had any estate or interest in certain estates comprised in an indenture of settlement of the 30th of September, 1790, of which estates a common recovery was suffered in Easter Term, 1815, it is material to see who were the parties living and interested in the estates at the time of that recovery.

John Tarleton, the grandfather of the plaintiff (then a trader within the bankrupt laws), was tenant for life, with remainder to his wife Isabella for life, with remainder to his son John Collingwood Tarleton (the father of the now plaintiff) in tail male, with remainder to the younger son of John and Isabella Tarleton, viz. Edward Thomas Tarleton, in tail male, with remainder to Margaret Anne Tarleton, the daughter of John and Isabella Tarleton, in tail general, with remainder to Alexander Collingwood (the original settlor) in fee. John Collingwood Tarleton had attained twenty-one years of age in 1815, but was not married till many years afterwards.

An indenture of bargain and sale, dated 18th March, 1815, was executed, by which John Tarleton, Isabella his wife, and J. C. Tarleton, joined in making William Ainge a tenant to the *præcipe* for the purpose of suffering a common recovery in which Robert Blake should be demandant, to such uses as should be expressed in another indenture of the same date. That recovery was suffered, in which Isabella Tarleton and J. C. Tarleton were vouchees, who vouched over the common vouchee. It is plain that there were proper parties to this recovery, and it was in all respects [*413] *regular. By indenture of lease and release of the 17th and 18th March, 1815, John Tarleton and Isabella his wife and J. C. Tarleton being parties to the release, the uses of the recovery were declared to be to J. C. Tarleton and his heirs during the life of John Tarleton for his own proper benefit, with remainder to Isabella Tarleton for life, with remainder to J. C. Tarleton for life, with remainder to his first and other sons in tail male, with remainder to Edward Thomas Tarleton for life, with remainder to his first and other sons in tail male, with remainder to Margaret Anne Tarleton for life, with remainder to her first and other sons in tail male, with sundry other remainders to unborn children; and with the ultimate remainder to John Tarleton in fee. By the same indentures other estates of which John Tarleton was seised in fee were conveyed by him to the same uses, except that J. C. Tarleton was to take an immediate estate for his life in them.

John Tarleton was at the time insolvent, and knew that he was so; and all this was done by him for the purpose of defrauding his creditors; but J. C. Tarleton was ignorant of the insolvency and of the intended fraud.

John Tarleton soon afterwards, on the 22nd June, 1815, became bankrupt; and, on the 11th July, 1816, the usual conveyance of all his estates and property was made to his assignees on their petition. The Court of Chancery, on the 2nd July, 1819, directed an issue at law to try whether the deeds and recovery were fraudulent and void in law as against the creditors of John Tarleton. The issue was tried; and the jury found that they were fraudulent and void as against the creditors. After this finding, the Court of Chancery, on the 16th December, *1819, decreed that the [*414] deeds of recovery were fraudulent and void as against the creditors, and that the assignees were entitled to possession, and, on the 12th March, 1821, further ordered that the deeds should be delivered up to the assignees to be cancelled, which was done accordingly. The decree does not profess to reverse the recovery or to set it aside; nor indeed had the Court any power or jurisdiction to do either one or the other; but the COURT ordered the deeds to be cancelled, which they clearly had jurisdiction to do: and, if by that decree and order the deeds of 17th and 18th March to lead the uses of the recovery became wholly inoperative, the present plaintiff cannot have any interest in the estates, because it is only by the release giving J. C. Tarleton an estate for life only, with remainder to his first son in tail male, that the plaintiff can found any claim.

It was contended for the plaintiff that the proceedings in Chancery were altogether wrong: that the deeds of 17th and 18th March, 1815, were executed on good considerations and valid in law: but no consideration given to J. C. Tarleton for extinguishing his estate tail in remainder and taking back only an estate for life was shown, except that of having his father J. Tarleton's estate for life in the settled property, and also an estate for his own life in the unsettled property, conveyed to him. That conveyance being clearly fraudulent and void within stat. 13 Eliz. c. 5, nothing whatever passed to J. C. Tarleton by the deeds; and, the consideration having utterly failed, not by matter *ex post facto*, but by reason of the original fraud in J. Tarleton, the father, nothing in his estates ever passed to his son; and the case stands the same as if there had never been any consideration or professed consideration

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whatever. The *case of *Roe* d. *Hamerton* v. *Mitton* (1), which was relied on by the plaintiff's counsel, is wholly different from the present; for there the party conveying and settling the land did take a benefit, and had a good consideration, in having part of his lands, of which he was seised in fee, discharged from an annuity. We are therefore clearly of opinion that the proceedings in Chancery were quite right. The only question is, what is the effect of them with regard to the estate of J. C. Tarleton in which the assignees of his father John Tarleton had no interest.

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The 4th section of stat. 13 Eliz. c. 5, was relied on as showing that a recovery, though fraudulent within that statute, would stand good as to other parties, and therefore that, as J. C. Tarleton was no party to any fraud, it would stand good as to him, and enure to the uses which he had declared by his deed. Now the words of that section, when examined, clearly show that it applies only to persons who are not parties to the recovery, but have estates in remainder or reversion subsequent to and expectant on the estates of those who are parties to the recovery. This section speaks of recoveries had "against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons;" and enacts that every such recovery "shall as touching such person and persons which then had any remainder or reversion" "stand, remain and be of such like force and effect, and of none other" as if this Act had never been made. It is plain that the persons here spoken of are not those against whom the recovery is *had. No doubt at all can exist as to the meaning, supposing a recovery to be suffered by tenant in tail in possession; nor can it make any difference that in this case the tenancy in tail was in remainder: for the recovery is had not only against the immediate tenant to the *præcipe* but against the vouchee. The meaning of the clause evidently is that, although the uses of a fraudulent recovery shall not prevail to defraud creditors, yet that the recovery shall stand good to bar those in remainder or reversion, as if there had been no fraud. J. C. Tarleton is not a person having a remainder or reversion within the meaning of the section of the statute; and therefore nothing that he has done in regard to the recovery can be affected by it: and the now plaintiff was not such a person; for he was not born till many years afterwards. But Edward Thomas Tarleton (the younger brother of J. C. Tarleton), and Margaret

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(1) 2 Wils. 356.

Anne Tarleton his sister, and Alexander Collingwood the original settlor, may be said to have been persons having a remainder or reversion: and therefore as regards them the recovery may stand good and in force under that section of the statute. It would however only stand good as a recovery simply, so as to bar their estates, wholly independent of the question as to the operation of the deed to lead the uses.

Now, if that deed, namely the release of 18th March, 1815, be wholly vitiated and done away with by the fraud of John Tarleton, it will follow that the now plaintiff has no interest in the lands. The recovery will then stand as a recovery simply without any deed to lead or declare the uses. In such a case, though it was originally held that it should enure to the old uses, **Argol* v. *Cheney* (1), *Waker* v. *Snowe* (2), and so J. C. [*417] Tarleton would remain tenant in tail male, yet subsequent cases show that the recovery would enure to give the fee simple to tenant in tail: *Nightingale* v. *Earl Ferrers* (3), *Stapilton* v. *Stapilton* (4) *Roberts's* case (5), *Martin* d. *Tregonwell* v. *Strachan* (6).

In either way the plaintiff would have no interest; for, if J. C. Tarleton remained tenant in tail, he plainly acquired the fee simple by a subsequent recovery suffered by him in Trinity Term, 1822. His father's assignees, who were then tenants for the life of the father John Tarleton, joining in making a tenant to the *præcipe*, by deeds of lease and release of the 5th and 6th July, 1821, the uses were declared after the death of John Tarleton to J. C. Tarleton in fee. If he did not remain tenant in tail, but the use under the recovery of 1815 was to him in fee, of course the now plaintiff could take nothing: added to which, the release of 6th July, 1821, declared that not only the recovery then intended to be suffered but all other recoveries should enure to the use of J. C. Tarleton in fee; so that, on the supposition that there was no deed to lead or declare the uses of the recovery in 1815, this deed of 6th July, 1821 (if it operated at all, which probably it would not, as the recovery to which it relates was wholly void) would operate as a deed to declare the uses of that recovery; for the non-joinder of Isabella Tarleton who was only tenant for life in remainder would not be of any importance.

John Tarleton and his wife Isabella having died before *J. C. [*418] Tarleton sold and conveyed the property to the defendant Liddell,

(1) Latch. 82.
(2) Palm. 359.
(3) 3 P. Wms. 206.
(4) 1 Atk. 2.
(5) 3 Atk. 308, 313.
(6) 2 R. R. 552, *n.* (5 T. R. 107, *n.*).

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it is not material to trace how John Tarleton's life interest in a moiety of the Collingwood estates, being the settled property in question, passed to J. C. Tarleton, together with the other moiety of which John Tarleton was seised in fee, by conveyance from the assignees for 30,000*l.* The whole case, in truth, resolves itself into this question; whether the deed of 18th March, 1815, is still a subsisting deed as regards the use declared by it to J. C. Tarleton for life with remainder to his first son (the now plaintiff) in tail male: even assuming, as we think we must, that the recovery of Easter Term, 1815, is still unreversed and subsisting as a recovery. Now the Court of Chancery ordered this deed to be cancelled. It was certainly void as regards the life estate of John Tarleton in the property in question, and as to the whole of the property of which he was seised in fee, and professed to convey by it. But it is said that the fraud of the father did not affect the conveyance by J. C. Tarleton of his estate in remainder; and that the Court of Chancery exceeded its power in ordering the whole deed to be cancelled, and should have declared it void *quoad* the property of which John Tarleton was seised in fee, and directed a reconveyance of the life estate of J. Tarleton in the settled property to his assignees, leaving the rest of that deed as well as the deed of bargain and sale of the 18th March, 1815, to make a tenant to the *præcipe*, and the recovery, untouched. It must be recollected that a fraud was practised on J. C. Tarleton by his father as much as it was upon the creditors. He was induced to execute the deed and join in the recovery by the consideration of having his father's life estate and his fee simple
[*419] estate *conveyed to him; which consideration utterly failed and never took effect by reason of the fraud: and he was obliged ultimately to purchase a part only of the estates proposed to be conveyed to him for 30,000*l.* Surely, then, the fraud may well be said to have tainted the whole transaction. The use first declared (that during the life of the father) being void on account of the fraud, must not the subsequent uses also be held void? In *Beckwith's* case (1), where husband and wife levied a fine of the lands of the wife, and the husband, without the wife's consent, by deed declared the uses to himself and wife for life with certain remainders over, and the wife by deed without the assent of her husband declared the uses to *her*self or life with the same remainders over as those contained in the deed of her husband, it was held that not only the uses for life in which they disagreed, but the subsequent uses in

(1) 2 Co. Rep. 56 b.

which they agreed, were all void, and the fine was by construction of law to the use of the wife and her heirs as if no use had been declared. So, here, we think that all the uses declared by the deed of March, 1815, must be held void, and that, by construction of law, the recovery enured to the use of the father for life (which passed to his assignees), remainder to the son in fee. Whether the Court of Chancery at the prayer of J. C. Tarleton would or would not have set aside the deed to lead the uses altogether, both as regarded him as well as the creditors, we need not enquire. The Court did not do so; the son does not appear to have been any party to the proceedings in Chancery; and the decree is only that the deeds and recovery were fraudulent and void as against *the creditors. The subsequent order that they should be [*420] delivered up to be cancelled seems to have been for the benefit and protection of the creditors, and not of J. C. Tarleton. J. C. Tarleton no doubt treated the recovery of 1815 as having been set aside by the Court of Chancery, and, considering himself to be still tenant in tail, as if that recovery had never been suffered, afterwards in 1822 suffered another recovery; but the Court of Chancery did not authorize that step; it dealt only with the estates of J. Tarleton the bankrupt, and authorized his assignees to sell a portion of them to J. C. Tarleton: the assignees also, in joining with J. C. Tarleton to make a tenant to the *præcipe*, express in the release of 6th July, 1821, that they do so "at the request and by the direction and for the accommodation of the said J. C. Tarleton;" and, as he could not then pay the purchase money, 30,000*l.*, the uses of the recovery are declared to the assignees during the life of J. Tarleton. Subsequently, by lease and release of 6th and 7th March, 1823, the purchase money being paid, the assignees conveyed to J. C. Tarleton their interest during the life of J. Tarleton in the property in question. From all this it is plain that no part of the proceedings in Chancery, either in its decrees or orders, and no act of the assignees, deals at all with the estate of J. C. Tarleton, or prevents the operation of the release of March 18th, 1815, by which he declared the uses to himself for life only, save and except the order of the COURT of 12th March, 1821, for delivering up the deeds to the assignees to be cancelled, upon which we have already commented.

But, if the deeds of March, 1815, be not wholly void, and J. C. Tarleton became under them tenant for life in remainder after the death of his father and mother, *with remainder to his first son in [*421] tail, still, as the consideration for his suffering the recovery of 1815

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and declaring the uses has wholly failed, or rather never existed, that declaration of uses must be considered as voluntary; and, on the part of the defendant (a purchaser for value in the year 1849), it is contended to be void within the statute 27 Eliz. c. 4.

Undoubtedly, if J. C. Tarleton had been seised in fee in 1815, and had made a voluntary deed settling his estate upon himself for life with remainder to his first and other sons in tail, though he afterwards married and had a son (the now plaintiff), he might in 1849 have sold and conveyed the lands to the defendant, a *bonâ fide* purchaser, as to whom, by all the authorities, the settlement of 1815 would have been void within stat. 27 Eliz. c. 4. But, whether that statute extends to the case of a tenant in tail suffering a voluntary recovery, with a deed to lead the uses also voluntary, is the question here. The settlor himself cannot at his own will and pleasure, if there be no sale or purchaser, treat his own voluntary settlement as void within stat. 27 Eliz. c. 4, and make a new settlement of the estate. Therefore, as J. C. Tarleton was only tenant for life in remainder at the time of the second recovery in 1822, being twenty-seven years before any sale took place, that recovery could not operate at all, and may be falsified by the now plaintiff, the alleged remainderman in tail under the release of 18th March, 1815. That second recovery in 1822 may, therefore, be put out of consideration in our enquiry as to the effect of stat. 27 Eliz. c. 4, with reference to the purchase made by the defendant in 1849. The only way in which it should seem that the statute of 27 Eliz. can

[*422] operate would be by treating *the sale and purchase by the defendant, in 1849, and the conveyance to him by J. C. Tarleton, as making void the declaration of uses in the voluntary deed of 18th March, 1815, and holding that thereupon the recovery of 1815, for want of a declaration of uses, would enure to give J. C. Tarleton a remainder in fee on the death of his father and mother, which he has conveyed to the defendant in 1849.

The case of *Doe* d. *Baverstock* v. *Rolfe* (1) is an express authority for so holding. That case was mainly grounded on the case of *Fitzjames* v. *Moys* (2): but all the authorities bearing upon this point were then considered; and we think that the conclusion at which the COURT arrived on such consideration was correct.

The result is, that either the deed of March, 1815, was wholly vitiated and done away with by the fraud of J. Tarleton the father, or, if not, that the uses declared in it by J. C. Tarleton the son were

(1) 47 R. R. 687 (8 Ad. & El. 650). (2) 1 Sid. 133.

voluntary. The effect is the same upon the supposed right of the present plaintiff in either view of the case.

We are therefore of opinion, under all the circumstances of this case, that the plaintiff Banastre Tarleton has not any estate or interest in the moiety of the Collingwood estates comprised in the indenture of settlement of the 30th September, 1790; and we shall so certify to the Vice-Chancellor.

A certificate was sent, as above.

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1851. *May* 1, 29.

(17 Q. B. 423—439; S. C. 20 L. J. Q. B. 444; 15 Jur. 1054.)

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Debt by administrator of B. on bond made by W. to B., dated 5th December, 1812. The condition recited that B. had agreed to advance to W. the produce of the sale of certain stock in the funds, without any other advantage than B. would have been entitled to if the stock had remained in his name in the Bank; that B. had sold the stock and paid the produce to W.; and that it had been agreed between them that the same or a like sum of the same stock should be replaced and transferred to B.; and the condition was that, if W., before 5th June then next, purchased the said amount of stock and transferred the same to B., and paid to B., in lieu of the dividends thereof, such sums as B. would have been entitled to receive for the dividends if the stock had continued in his name, at such times, and in such proportions, and in such manner, as the dividends would have been payable to B. if the stock had not been sold, then the bond to be void. Breach: (1) that W. did not, before the 5th June, or since, purchase the said amount of stock and transfer to B., or to plaintiff as administrator; (2) that the dividends of the stock, if it had remained standing in the name of B., would have been payable half yearly after the date of the bond, and that the first and only one of such dividends before the said 5th June would have been payable on 5th January, 1813; that on 11th September, 1824, B. died: that, if the stock had continued standing in B.'s name, or plaintiff's as administrator, a large sum, to wit &c., would have been payable half yearly as dividends, and that the money payable in lieu of such dividends, and becoming due after B.'s death (during a period which was specified), amounted to a large sum, to wit &c.; and that, although the stock had not been transferred into the name of B., or of his administrator, yet W. had failed to pay the sums so due in lieu of dividends.

Plea: that the causes of action did not accrue within twenty years next before the commencement of the suit.

Replication, as to the first breach, that, while the stock remained untransferred, and a certain sum, to wit &c., was due in lieu of the dividends, to wit on 10 September, 1824, W. made an acknowledgment to J. B. that the stock remained untransferred contrary to the condition, and was due thereon, by W. making to B. satisfaction on account of part of the said sum, to wit 10*l.*; and that the action was brought within twenty years next after such acknowledgment; and, as to the other causes of action, that they did accrue within twenty years &c.

Rejoinder, as to the first part of the replication, a traverse of the bringing of the action within twenty years next after such supposed

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acknowledgment. Issue thereon. As to the second part of the replication, issue was joined.

It was proved that B. had, since the advance to W., agreed to board and lodge with W. at 10*s.* 6*d.* per week, that amount to be deducted from the interest of the money which W. had borrowed; and that a settlement should be made every six months. B. had boarded and lodged with W. till B.'s death, in September, 1824; but no settlement had ever taken place, though frequently demanded by B.:

Held, first, that, supposing the issue raised by the rejoinder cast upon plaintiff the burthen of proving that such an acknowledgment as that mentioned in the replication was made within twenty years next before &c., there was sufficient evidence to entitle plaintiff to a verdict upon both the first and the second issues.

Secondly, that the bond was not within stat. 3 & 4 Will. IV. c. 42, s. 5; that the replication, therefore, was no answer in law to that part of the plea which related to the first breach; and that plaintiff was therefore not entitled to any damages on that breach.

But, thirdly, that that part of the condition which stipulated for the payment, from time to time, of the sums payable in lieu of the dividends still remained in force as to so much of the sums as had accrued due, from time to time, within twenty years before action brought, the penalty of the bond not having been insisted upon in respect of sums accruing due earlier; and that plaintiff, therefore, was entitled to damages in respect of so much of the second breach.

DEBT. The declaration stated that Thomas Wood, since deceased,
[*424] in the lifetime of Joseph Buckley, *also since deceased, to wit on 5th December, 1812, by his certain writing obligatory, bearing date the day and year last aforesaid, and sealed &c. (*profert* excused, the bond not being in the possession or power of plaintiff), acknowledged himself to be bound unto the said J. Buckley in the sum of 2,000*l.*, to be paid to the said J. Buckley, his executors, administrators, &c.: which writing obligatory was subject to a condition, whereby, after reciting that the said T. Wood, having occasion to borrow and take up at interest the sum of 877*l.* 4*s.* 1*d.* stock of the 5*l.* per cent. Navy Annuities transferable at the Bank of England, had requested J. B. to advance him the same or the produce by sale thereof, which J. B. had consented and agreed to do without any advantage whatever on his part otherwise than he would have been entitled to in case the same stock had continued to stand and remain in his own name in the books of the Governor &c. of the Bank; and that J. B. had accordingly caused the same stock to be sold, and upon or immediately before the execution of the said writing obligatory paid the produce thereof, amounting to 792*l.* 4*s.* 2*d.* unto the said T. W., which T. W. did thereby acknowledge: And that it had been agreed, by and between T. W. and J. B., that the same or a like sum of 877*l.* 4*s.* 1*d.* stock in the said Navy 5*l.* per cent. Annuities should be replaced and transferred to

J. B. at the time and in manner thereinafter mentioned: It was conditioned that, if T. W., his heirs, executors or administrators, or any or either of them, should, on or before 5th June next ensuing the date of the writing obligatory, purchase the sum of 877*l.* 4*s.* 1*d.* stock of the 5*l.* per cent. Navy Annuities, transferable at the Bank, and transfer or cause the same to be transferred unto or into the name or names of *J. B., or of his executors, &c., or of [*425] such person as he or they should appoint, and well and truly pay or cause to be paid to J. B., his executors, &c., in lieu of the dividends thereof, such sum or sums of money as J. B., his executors, &c., would have been entitled to receive as or for the dividends of the said sum of 877*l.* 4*s.* 1*d.* stock in case the same had continued standing in his or their own name or names for his or their proper use, at such time and times, in such shares and proportions, and in such manner, as the same dividends would have been payable to him or them in case the same had not been sold in manner aforesaid, then the said obligation should be void &c.: otherwise &c. The declaration further alleged that, although the said 5th day of June next ensuing &c. elapsed in the respective lifetime of the said J. B. and T. W., and although J. B. did not appoint or transfer the said 877*l.* 4*s.* 1*d.* stock of the 5*l.* per cent. &c., or any part thereof, into the name or names of any person or persons other than himself the said J. B., and although T. W. did, to wit on 5th January, 1813, pay to J. B. such a sum of money, in lieu of the dividends of the said sum of 877*l.* 4*s.* 1*d.* stock &c. as J. B. would have been entitled to receive on the day and year last aforesaid, as or for the dividends of the same stock in case the same had continued standing in his name (the said 5th January, 1813, being the only day between the date of the writing obligatory and the 5th June next ensuing the date thereof when any such dividend on the same stock would have become payable): Yet that T. W. did not nor would, on or before the said 5th June, purchase the said sum of 877*l.* 4*s.* 1*d.* stock, and transfer the same, or cause the same to be transferred, unto or into the name of J. B., as *by the said con- [*426] dition of the said writing obligatory he ought to have done, but therein wholly failed and made default; and the said amount of stock never had been, nor had any part thereof or any stock in lieu thereof ever been, transferred into the name of the said J. B., or of the plaintiff, administrator as aforesaid, or either of them; and the same is and remains wholly untransferred, contrary to the tenor &c. of the condition.

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Second breach. That the dividends of the stock in the condition mentioned, in case the same had not been sold as aforesaid, but had continued standing in the name of the said J. Buckley, would have been payable half yearly from and after the date of the writing obligatory, on 5th January and 5th July in every year; and the first of such half yearly dividends would have been so payable on 5th January, 1813; and that that half yearly dividend was the only dividend which would have so become payable after the making of the writing obligatory and before the said 5th June in the condition mentioned. And that J. B., afterwards, and after the passing of a certain Act of Parliament (1) "For transferring several Annuities of 5*l.* per centum per annum into Annuities of 4*l.* per centum per annum," to wit on the 11th September, 1824, died. That, in case the stock in the condition mentioned had not been sold, but had continued standing in the name of J. B., or of the plaintiff as administrator, within the true intent, &c., of the condition, a large sum of money, to wit 18*l.* 8*s.* 5*d.*, would, on every 5th day of January and 5th day of July, in each of the years 1825, &c. (to 1830, inclusive), have become due, &c., as and for the dividends thereof: And the several sums of money payable by
[*427] virtue of the condition in lieu of such *last-mentioned dividends respectively (and which sums respectively became due by virtue of the condition after the decease of the said J. B.) amounted in the whole to a large sum of money, to wit 221*l.* 1*s.* That afterwards, and after the passing of an Act of Parliament (2) "For transferring certain Annuities of 4*l.* per centum per annum into Annuities of 3*l.* 10*s.* or 5*l.* per centum per annum," another large sum &c.: averment that 16*l.* 2*s.* 4*d.* would, on every 5th January and 5th July from 1831 to 1844 inclusive, have become due, payable &c., as and for the dividends in the said condition mentioned, if the said stock had not been sold: and the sums payable by virtue of the same condition in lieu of such last-mentioned dividends respectively (and which also became due by virtue of the condition after the decease of J. B.) amounted in the whole to a large &c., to wit 451*l.* 5*s.* 4*d.* That afterwards, and after the death of J. B., and after the respective sums of money hereinbefore mentioned in lieu of the several dividends aforesaid had so become due, and before the commencement of this suit, to wit on 3rd September, 1844, administration of the goods &c. of J. B. was first granted to

(1) Stat. 3 Geo. IV. c. 9.

(2) Stat. 11 Geo. IV. & 1 Will. IV. c. 13.

plaintiff. And, although the said stock in the condition mentioned hath not, nor hath any part thereof, or any stock in lieu thereof, or any part thereof, ever been transferred into the name of J. B. or of plaintiff, administrator &c., or of any other person within the true intent &c., yet &c.: Averments that T. Wood in his lifetime did not, nor did nor would defendants, executors &c., pay to plaintiff, administrator &c., the respective sums which so became due and payable, according to the condition &c., in lieu of the several dividends aforesaid or any part thereof; *but the same, amounting to 672*l.* 6*s.* 4*d.*, are now wholly due and unpaid &c. to plaintiff, administrator as aforesaid, contrary to the tenor &c. of the condition. [*428]

By reason of which said several breaches the writing obligatory became forfeited: and thereby an action hath accrued to plaintiff, as administrator, to demand and have of and from defendants, as executors, the said sum of 2,000*l.* above demanded.

Pleas. 1. That the bond was not the deed of testator. Issue thereon. 2. That the causes of action in the declaration mentioned did not, nor did either of them, accrue at any time within twenty years next before the commencement of this suit.

Replication to the 2nd plea, so far as the same related to the breach of condition first assigned: That, at the time of the making of the acknowledgment by Thomas Wood as thereinafter mentioned, the amount of stock in the condition mentioned was and remained wholly untransferred, contrary to the tenor &c. of the condition in that behalf; and that a certain sum of money, to wit 18*l.* 8*s.* 5*d.*, was then due and payable from T. W. to J. B., pursuant to the said condition, in lieu of certain dividends which J. B. would have been entitled to receive for and in respect of the said sum of 877*l.* 4*s.* 1*d.* stock of the 5*l.* per cent. Navy Annuities, in case the same had continued standing in his name and had not been sold as in the condition mentioned; and that, after the making of the writing obligatory, and whilst the said stock was and remained wholly untransferred as aforesaid, and whilst the said sum of money last mentioned was so due and payable in lieu of such mentioned dividends, to wit on 10th September, 1824, T. W. made an acknowledgment to the said J. B. that the said amount *of stock in the said condition mentioned then remained and was untransferred contrary to the said condition in that behalf, and was then due thereon, to wit, by T. W. then making to the said Joseph Buckley part satisfaction on account of the said writing obligatory, that is to say, by T. W. then [*429]

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making to the said J. B. satisfaction on account of part of the said sum of money so then due and payable in lieu of the said last mentioned dividends, to wit of 10*l.*, part thereof; and that the action was brought within twenty years next after such acknowledgment so made by T. W. by such part satisfaction on account as aforesaid.

And, so far as the said plea related to the several causes of action in the declaration mentioned, except the breach of the said condition firstly assigned; That the said causes of action, except as last aforesaid, and each and every of them, did accrue within twenty years next before the commencement of this suit.

Rejoinder, as to the first part of the replication: That the action was not brought within twenty years next after the supposed acknowledgment by T. W. in the replication alleged to have been made. Issue thereon. As to the second part of the replication, issue was joined.

The cause was tried before Coleridge, J., at the Spring Assizes for Bristol, 1851, when a verdict was found for the plaintiff on all the issues, subject to the opinion of the Court on a case, the material parts of which were as follows.

The case began by stating that the action was brought and tried in pursuance of a decree of Sir J. L. K. BRUCE, V.-C., of the 9th of July, 1847, in a suit in Chancery between the said *James Blair* (complainant) and the said *W. Ormond* and *W. Hayward* and
[*430] others (defendants); *whereby, upon hearing read certain exhibits, the defendants' answers, and the proofs, &c., it was ordered that the now plaintiff, and the now defendants or the defendant Hayward, should proceed to a trial in an action of law to be brought by plaintiff against Ormond and Hayward, or Hayward alone, upon the said bond; and that such action should be deemed to have been commenced on 4th September, 1844, the day of the filing of plaintiff's bill: and that for the purposes of such action the defendants or defendant therein should admit assets, and that the bond was not in plaintiff's possession or power, and that it was duly executed, and that it was in conformity with the exhibit (defendants being, nevertheless, at liberty to take any objection as to stamp (1); and for that purpose defendants were at liberty to plead *Non est factum*): and defendants were to admit grant of administration to plaintiff, as in the pleadings mentioned, on 3rd September, 1844: and both parties were to admit that J. Buckley died on 11th September, 1824, and that T. Wood died on 5th March, 1843.

(1) See *Blair* v. *Ormond*, 14 Q. B. 732.

The plaintiff produced on the trial the original draft bond from which the bond mentioned in the decree as bearing date 5th December, 1812, was engrossed (and which was one of the exhibits before the Vice-Chancellor); and such draft was a correct copy of such bond. The case then set out the draft, which, including the condition, corresponded with the bond and condition alleged in the declaration.

(The case then made some statements as to the other exhibits, which are not now material.) The omissions were made as ordered.

The case then set out evidence to show that in fact Buckley had [431] sold out the stock; that he had, thereafter, been boarded by Wood at 10*s.* 6*d.* per week; that, from language of Wood, which was stated, it appeared that this allowance had been made by him in respect of the loan; and that the arrangement had been continued down to Buckley's death, in September, 1824 (1).

(1) The following are extracts from the evidence set out in the case.

Susannah Joyce, the wife of William Joyce, proved that she was the daughter of William Wood, who was the nephew of the said T. Wood. That she was born in the year 1800; &c. The evidence then stated the circumstances under which Susannah had the opportunity of witnessing what passed in Thomas Wood's house. That she knew J. Buckley. That he boarded and lodged with the said T. Wood at Charlton. That, before 1812, he went away every six months, and used to bring the interest of his money. That it was the interest of his money from the Bank. She heard it was so from T. Wood and from Buckley. That, out of that money, he used to pay 10*s.* 6*d.* a week to T. Wood for board and lodging and washing. That Buckley used to make her a present of a five shilling piece every half year when he received his dividends. That she had heard conversations between T. Wood and Buckley about Buckley's money in the funds. She had heard her uncle say: "Sell out your money in the funds, and let me have it, as the Bank will break. I will let you have more interest than you get at the Bank for it." She had heard that several times. That Buckley was very much against it for some time; but he at length complied with it. That that was about 1812. That he went away to London and came back, and brought back the money, 800*l.* odd, sewed in his shirt under his left arm. That, after the loan, she had heard conversations between Buckley and Wood about the advance, and about Buckley's board and lodging. That what she heard from them was, that the half guinea a week for his board, lodging and washing was settled to be paid from the interest of the money. That the half guinea a week for his board, lodging and washing was settled to be deducted from the interest of the money which the said T. Wood had borrowed. That that agreement was made after Buckley had sold out his stock; and that they were to have a settlement every six months, the same as he had when he had brought the money from the Bank; but they never had a settlement afterwards. That she had heard Buckley ask her uncle for a settlement repeatedly after the loan, sometimes two or three times a day, sometimes not for a week or so. On those occasions he would say: "Landlord" or "Doddy," "I want you to settle with

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The pleadings on both sides were to form part of the case. The question for the opinion of the COURT was:

Whether there was evidence, to go to the jury, to entitle the

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[*432, *n.*]

me." He was in *the habit of calling him Landlord more frequently than Doddy. That sometimes her uncle would give him a few shillings, sometimes not, saying, "What do you want with money? You have plenty to eat and drink." All this took place before the year 1817. (Some facts were then added, showing the facility with which Buckley was managed by Wood, especially as to the custody of Buckley's papers.) That she had heard Buckley say to Wood: "You have got my money; and I can neither get principal or interest; you keep me penniless." That, after Buckley's death, Wood told her that Buckley had lived to spend all his money; whereupon she told him she knew better, and that he never gave him the chance to spend it. That Wood made no answer, but smiled and walked away. That, after the loan of the stock, Buckley did not appear to have in his pocket any more money than two old five shilling pieces and a few halfpence, but no money to any amount: and that, with respect to his usual habits as to expenses, she never knew him to spend anything except for a bit of gingerbread which he would buy, and such a thing as that.

[*433, *n.*]

Buckley continued, from the time of the said arrangement between him and Wood, until the decease of Buckley, to board and lodge with Wood. Buckley died in the house of Wood, at an advanced age, on 11th September, 1824: and there were two crown pieces in Buckley's pocket when he died.

Sarah Bartlett proved that she had heard Joseph Buckley ask Thomas Wood for a settlement. That the last time she heard this was in April, 1823. That Mrs. Wood then said to her husband Thomas Wood: "We have had Buckley's money; and you pay it." Wood then said: "Well, Prue, we had; and I mean to pay it."

Simon Goodie, who had lived with Wood from Michaelmas, 1822, to Michaelmas, 1823, proved that he had frequently heard Buckley say: "Please, Mr. Wood, settle with me." Wood used to be very mild with him, and say, "I will do so another day." That that would pacify him; and he would go away, and come back, and Wood would tell him the same story; and sometimes Wood would say that he would settle with him another day. Wood was never harsh with him, and used to say, "I will settle with you another day, Mr. Buckley," and always was very mild. Sometimes Buckley would break out into a passion with Wood, and call Wood a rogue.

William Wood, a nephew of Thomas Wood, proved that, in September, 1814, he went to live in a house of his uncle's at Charlton, and that Buckley was living with his uncle at that time at Charlton. That, in answer to *applications for a settlement by Buckley, Thomas Wood used to say, "You don't want money." That he never saw his uncle Thomas Wood give Buckley money. And that, after Buckley's death, he said to his uncle, "How you must be put about for money by Buckley's death:" in answer to which his uncle said that, if no papers could be found, nothing could be redeemed; and that he had taken care of that. That Buckley was ill for one week before his decease; and that he was not sensible during that week.

It was admitted by the defendants' counsel that Buckley was a weak-minded man, and that the stock mentioned in the condition of the bond had never been transferred. Buckley was taken ill on a Saturday, and died the next Saturday, 11th September, 1824. He was not quite sensible all the week; not sensible so as to converse, in any part of the week.

plaintiff to a verdict on the issues raised upon the 2nd plea, or either of them; and whether the said evidence was sufficient in that behalf; the Court to draw such inferences of fact as the jury might have drawn. And the verdict on those issues was to be entered for plaintiff or for defendants, as the Court might direct. Either party to be at liberty to raise all objections arising either from the facts or on the face of the record. And either party to be at liberty to turn the special case into a special verdict, amending it first by adding as facts such inferences as the Court might have drawn.

The case was argued in last Easter Term (May 1st (1)), by *Kinglake*, Serjt., for the plaintiff, and by *Butt* for the defendants. The points relied upon in argument appear sufficiently by the judgment.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (May 29th), delivered the judgment of the COURT:

The first question to be considered in this case is, whether there was evidence to go to the jury to entitle *the plaintiff to a verdict [*434] on the first issue on the second plea. We think that there was. The defendants merely rejoined, as to the part of the plaintiff's replication to the second plea firstly replied, that the said action was not brought within twenty years next after the said supposed acknowledgment of the said Thomas Wood in the said replication alleged to have been made. Supposing that this casts upon the plaintiff the burthen of proving that such an acknowledgment as is stated in the replication was made within twenty years next before the commencement of the action on the 4th of September, 1844, we think that the evidence was quite sufficient for that purpose, as it proved an agreement between Wood and Buckley that Buckley should be boarded and lodged by Wood for the weekly sum of half a guinea, and that this weekly sum should go and be accepted in part satisfaction of the sums due from Wood to Buckley in respect of the dividends on the stock, till it should be replaced; and, further, that this agreement was carried into effect and acted upon till the death of Buckley on the 11th of September, 1824, down to which time he was boarded and lodged by Wood; the weekly payment, by the agreement, going and being received under the agreement in satisfaction of money then due and growing due

(1) Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

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from Wood to Buckley in respect of the dividends, the stock never having been replaced. Therefore, if this evidence is believed, immediately before the death of Buckley, Wood made acknowledgment to him that the stock remained untransferred, and was then due; and Wood then made to Buckley part satisfaction on account of the bond, by making Buckley satisfaction on account of part of the sum of money then due and payable in lieu of the dividends.

[*435] There being *such evidence, we draw from it the inference which I have stated: and, the action having been commenced within twenty years, this issue must be entered for the plaintiff. The cases of *Hart* v. *Nash* (1) and *Hooper* v. *Stephens* (2) are in point to show that such a dealing is equivalent to a money payment (3).

The verdict upon the second issue raised on the second plea must likewise be entered for the plaintiff, as the dividends mentioned in the second breach became due within twenty years next before the commencement of the action.

By the agreement between the plaintiff and the defendants, stated in the special case, either party is at liberty to raise any objection on the face of the record. And the defendants objected that the first replication to the second plea is bad in point of law, because such an acknowledgment as is there stated would not take the case out of the Statutes of Limitations.

To judge of this objection, we must look to see what the real contract was, as it appears from the bond and condition bearing date 5th December, 1812.

The condition contains a recital, that Wood wished to borrow from Buckley, and to take up at interest, the sum of 877*l.* 4*s.* 1*d.*, Five per Cent. stock, and had applied to Buckley to advance him the same, or the produce by sale thereof; which Buckley had agreed to do, being only entitled to as much as he would have received in

[*436] case the stock had continued standing in his own name. It *then recites that the stock had been sold out, and the produce thereof, amounting to 792*l.* 4*s.* 2*d.*, had been paid to Wood; and that it had been agreed between them that the like sum of 877*l.* 4*s.* 1*d.*, Five per Cents., should be replaced by Wood in the name of Buckley. The condition is then declared to be, that Wood should replace

(1) 41 R. R. 732 (2 Cr. M. & R. 337; *S. C.* 5 Tyr. 955).

(2) 43 R. R. 306 (4 Ad. & El. 71).

(3) *Worthington* v. *Grimsditch*, 68 R. R. 502 (7 Q. B. 479); *Callander* v. *Howard*, 84 R. R. 575 (10 C. B. 290); *Bevan* v. *Gething*, 61 R. R. 382 (3 Q. B. 740), and the note in 1 Sm. L. C. 321 [11th ed. p. 579] on *Whitcomb* v. *Whiting*, 2 Dougl. 652, were also referred to during the argument on this point.

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the stock on or before the 5th day of June, 1813, and pay to Buckley, in lieu of the dividends thereof, such sum or sums of money as Buckley would have been entitled to receive for the dividends of the 877*l.* 4*s.* 1*d.* in case the same had continued standing in his name, at such time and times, in such shares and proportions, and in such manner, as the same dividends would have been payable to him in case the same had not been sold in manner aforesaid.

The bond is conditioned for the replacing a precise amount of stock on a fixed day, viz., 5th June, 1813, not for the payment of any given sum of money on that day, nor even for the payment of such a sum of money as would purchase the given amount of stock; but for replacing the stock itself.

Such being the nature of the instrument on which the action is brought, we are to consider whether it comes within sect. 5 of stat. 3 & 4 Will. IV. c. 42, by which it is provided that, if any acknowledgment shall have been made, either by writing, or by part payment or part satisfaction on account of any principal or interest being then due on any specialty, it shall be lawful to the persons entitled to the action to bring their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid. The defendants' counsel insisted that this cannot extend *to a bond conditioned for the replacing of [*437] stock, arguing that this is an act to be done, and that the breach sounds in damages, depending upon the price of the stock when it ought to have been replaced or when the action is brought.

We are of opinion that this view of the 5th section is correct. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee is not payment of interest; neither is any sum of money thereby acknowledged to be due. Indeed the replication itself does not so allege; but only that the said Thomas Wood made an acknowledgment that the said amount of stock remained untransferred, by making part satisfaction on account of the money so payable in lieu of dividends. This averment certainly does not bring the case within the words of the 5th section, nor (as we think) within the spirit of it. If any authority was wanting, we have the case of *Gillingham* v. *Waskett* (1), in which it was held that a plea of set-off to such a bond was bad, because it was not a bond for the

(1) 13 Price, 434.

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payment of money. The argument, that, as the bond in question is plainly within the 3rd section, it must necessarily be within the 5th, is quite untenable; for it is obvious that a bond conditioned to perform the covenants of a lease in respect of repairs, or any other matter sounding purely in damages, would be within the 3rd section; and yet it would be impossible by any ingenuity of construction to bring it within the 5th. As, therefore, the first breach relates to the day of default, viz. 5th June, 1813, which was more than twenty years before the action, and the plea sets up that defence, to which
[*438] the replication is no answer in law, we are of *opinion that, though the verdict on the rejoinder taking issue on that replication must be found for the plaintiff, the plaintiff nevertheless is not entitled to any damages on that breach, on account of the insufficiency of the replication.

The second breach stands on very different grounds. Though the remedy to recover damages for not replacing the stock is taken away by lapse of time, yet the condition so to replace it is not thereby wholly destroyed: and that part of the condition which requires the payment from time to time of such sums of money as would have been payable by way of dividends if the stock had remained in the name of Buckley still continues in force. This last stipulation is distinctly expressed in the words of the condition, that Buckley was to receive such sums of money as he would have been entitled to for dividends at such times and in such manner as the dividends would have been payable to him if the stock had not been sold out. The defendants' counsel contended that this extends only to the payment of the dividends down to the 5th June, 1813, when the stock was to be replaced. But down to that day there could only have been one dividend due; and the language employed seems to us clearly to extend to all accruing dividends till the stock should be replaced.

It was further contended that the Statute of Limitations must run from the 5th June, 1813, when there was a forfeiture of the bond for not replacing the stock. But, as is laid down by PARKE, B. in the recent case of *Sanders* v. *Coward* (1), "although, on the first breach of the condition of a bond, the obligee may sue the obligor,
[*439] and have judgment under stat. 8 & 9 Will. III. c. 11, as *a security of a higher nature for future breaches, he is not bound to pursue that course. He may waive the right of action on the bond, in respect of the first breach, or any number of breaches, and be contented

(1) 15 M. & W. 48, 56.

with the specialty security only for future breaches, and sue afterwards on a subsequent forfeiture, and assign that for a breach" (1).

For these reasons we are of opinion that the plaintiff is entitled to judgment on the second breach.

Leave is reserved to turn the special case into a special verdict: but there are no materials for a special verdict; and the only questions which can now be debated appear on the record, and may be brought before a superior Court by writ of error. Our judgment, therefore, is that the verdict entered for the plaintiff must stand, and that the judgment be entered for the plaintiff for the penalty of the bond; but that the damages be confined to those claimed in the second breach.

Ordered: That the verdict entered herein for the plaintiff do stand, and that judgment be entered for the plaintiff for the penalty of the bond: but that no damages be levied on the first breach, and that damages (viz.) 672*l.* 6*s.* 4*d.* be levied on the second breach.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH).

THE SOUTH EASTERN RAILWAY COMPANY *v.* THE QUEEN (2).

1851. *May* 14. *June* 18.

(17 Q. B. 485—495; S. C. 20 L. J. Q. B. 428; 15 Jur. 871.)

[485]

A *mandamus*, suggesting that a railway crossed a certain public highway, not on a level, by means of a cutting, along which the line of railway was laid down, and that the said highway was thereby cut through and destroyed, and rendered impassable, and that a reasonable time had elapsed for the Company to cause the highway to be carried over the railway by a bridge, commanded them to cause the said highway to be carried over the railway by means of a bridge, in conformity with the regulations of the Railways Clauses Consolidation Act, 1845:

Held, that the *mandamus* was bad; for that the Act gave the Company, by sect. 46, the option of carrying, by means of a bridge, either the road over the railway, or the railway over the road; and that there was nothing stated on the record which showed that such option was at an end.

MANDAMUS to the South Eastern Railway Company. The writ stated that the railway from the London and Greenwich Railway

(1) *Tuckey* v. *Hawkins*, 72 R. R. 680 (4 C. B. 655); *Beaty* v. *Greenslade*, 2 Cr. & J. 61; *S. C.* 2 Tyr. 121; *Hollis* v. *Palmer*, 2 Bing. N. C. 713; and *Savile* v. *Jackson*, 13 Price, 715, were also cited in the argument on this point.

(2) Affd. 4 H. L. C. 471; 17 Jur. 391.—A. C.

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to Woolwich and Gravesend, which the South Eastern Railway Company were authorized to make under their local Act (1), "crossed, not on a level, a certain public highway," in the parish of Plumstead, Kent, called &c., "by means of a certain trench or cutting of twenty feet deep and sixty-five feet wide, made by you," the said Company, "through and along which said trench or cutting the line of the said railway has been by you caused to be and is
[*486] carried," "and the permanent way thereof has been by *you, and is, laid down therein; and the said public highway is thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages;" that the available width for the passage of carriages within fifty yards of the points of crossing the same was, and at the time of such crossing was, greater than twenty-five feet; "that a reasonable time for you, the said Company, to cause the said public highway to be carried over the said railway by means of a bridge, in the manner provided by" the Railways Clauses Consolidation Act, 1845 (2), "has long since elapsed; yet you, the said Company, have refused and neglected, and still" &c., "to cause the said highway" &c. (as before); "by means of which said neglect and refusal the said highway remains and is wholly impassable for passengers and carriages; in contempt" &c., "and to the great damage" &c.; the writ then commanded the Company to "cause the said public highway to be carried over the said railway by means of a bridge, in conformity with the regulations in that behalf of the said Act," "that is to say" &c. (besides other particulars prescribed by sect. 50 of the Act) "the ascent shall not be more than one foot in twenty feet." Return: "That the said way or road in the said writ mentioned was not a public highway, as in the said writ is in that behalf suggested and alleged;" and that for that reason the Company had not caused, and ought not to cause, the way or road to be carried over the railway by means of a bridge, in manner and form &c. This allegation was traversed, and issue joined.

On the trial, before Pollock, C. B., at the Kent Summer Assizes, 1851, the jury found that the said road was a public highway.
[*487] Judgment, awarding a peremptory **mandamus*. Upon this judgment the Company brought error. Joinder in error.

(1) 9 & 10 Vict. c. cccv. (Local, personal, public): "To enable the South Eastern Railway Company to make a railway from the London and Greenwich Railway to Woolwich and Gravesend."

(2) 8 & 9 Vict. c. 20.

The case was argued in last Easter Term (1), before Maule and Williams, JJ., and Parke, Platt and Martin, Barons.

Peacock, for the plaintiffs in error:

The writ is bad. Section 46 of the Railways Clauses Consolidation Act, 1845, enacts that, "if the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided." The Company, therefore, have the option of two methods of carrying the road from one side of the railway to the other; whereas the precept of the writ does not leave them that option, but commands them to adopt one particular method of the two.

(PARKE, B.: Does the writ prescribe any limit as to the slope?)

It prescribes the limit enacted by section 50 of the Railways Clauses Consolidation Act, 1845, where the road is a public carriage road; that is, that the slope shall not be greater than one foot in the limit prescribed by section 50; which limit varies according as the road is "a turnpike road," "a public carriage road," or "a private carriage road." Here, again the writ is bad; for it does not state under which of those descriptions the road in question falls. It states only that the road is a public highway.

(MAULE, J.: In prescribing the amount of slope, the writ assumes that it is possible to adopt the *particular mode of construction, [*488] that is, over the railroad.)

The *mandamus* ought to show that the alternative, of carrying the railway over the road, could not be adopted. There is no reason, in the present instance, why the road could not be carried under the cutting by a tunnel, any more than it would be impossible to carry it over an embankment by a bridge. But the impossibility, in fact, of choice between the two alternatives would be no answer; the writ can only command the Company to do that which the law lays down as their duty, impossible or not.

(MAULE, J.: May not the fact stated in the writ, that a reasonable

(1) May 14, 1851.

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time for making the bridge has elapsed, be supposed to fix the particular alternative?)

There is no allegation, nor anything to show, that the lapse of reasonable time would make the particular alternative reasonable. The Company have not yet made their election, as they have a right to do; and the writ is bad for commanding them to do more than that: *York and North Midland Railway Company* v. *The Queen* (1), *Rex* v. *The Church Trustees of St. Pancras* (2), *Reg.* v. *Caledonian Railway Company* (3), *Reg.* v. *Tithe Commissioners* (4).

(MAULE, J.: It is quite consistent with this writ that the Company have actually carried the road under the railway.)

At all events, there is no allegation that that has not been done. The writ is also bad for not stating that the road did not come within the proviso of section 52 of the Railways Clauses Consolidation Act, 1845, by having a mesne inclination greater than that required
[*489] by section 50. *The authorities show that the writ, if bad in part, is bad altogether.

Needham, contrà:

The Company have not the option of carrying the road either over or under the railway. Section 46 of the Railways Clauses Consolidation Act, 1845, provides for cases where a railway crosses a road not on a level with it; it enacts that there "either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge." That is to be understood as meaning that the first method is to be adopted where the road is above the level of the railway, and the second when the road is below the level of the railway. The Company, therefore, in the present instance, are bound to adopt the first. If it had been intended to give Railway Companies an option under the Act, this would have been given in express terms.

(MAULE, J.: Suppose the road were only a foot above the level of the railway, would not the Company have the option of carrying the railway over the road, instead of the road over the railway?)

(1) 80 R. R. 280, note (3) (14 Q. B. 472, note (c)).
(2) 3 Ad. & El. 535.
(3) 83 R. R. 371 (16 Q. B. 19).
(4) 80 R. R. 271 (14 Q. B. 459). And see *Reg.* v. *The Kidwelly and Llanelly Canal and Tramroad Company*, 80 R. R. 286, note (2), 14 Q. B. 481, note (a).

It is doubtful whether they have any option; and, if they have, they have in the present instance, determined it, by cutting through the road, and laying down this permanent way below the level. They cannot now contend that an option still remains to them; it is impossible for them now to carry the railway over the road.

(PARKE, B.: They might carry the road under the railway, which would amount to the same thing.)

They have no power to do so; they cannot make a tunnel; section 46 expressly states that a bridge is to be made in either case. As to the argument that the *mandamus* must command the performance of that which the Act lays down as to be done, whether impossible [*490] or not, *Reg.* v. *Caledonian Railway Company* (1) and *Reg.* v. *London and North Western Railway Company* (2) decide the contrary.

(MAULE, J.: Section 46, if it gives an option, of course, gives it only where such option is possible.)

And, in the present case, the Company have themselves destroyed their option; there is now no road over which the railway can be carried. It is contended that the writ is bad for prescribing the conditions laid down in section 50, without showing, on the face of it, enough to bring the case within these conditions, that is, that the road is either a turnpike road or a public carriage road. But that descriptive part of the writ is not material; the only material part is that which commands the building of a bridge. Besides, a turnpike road is, *primâ facie*, a public carriage road: and moreover the writ states that the road has been rendered impassable for passengers and carriages.

Peacock, in reply:

It is not impossible to adopt the alternative of carrying the railway over the road; the Company can alter the railway for that purpose, if they choose.

(PARKE, B.: If they have made a mistake by laying down the permanent way, as it is at present, owing to their ignorance of the road being a public highway, the proper return would be a statement of the mistake and its cause.)

The Company have not yet exercised their right of option.

(1) 83 R. R. 371 (16 Q. B. 19). (2) 83 R. R. 758 (16 Q. B. 864).

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[*491]

(MAULE, J.: If a man is to do something on Monday or Tuesday, and does not do it on Monday, he must do it on Tuesday. The Company are in that position; they *have themselves made it impossible to carry the railway over the road; and they have no power to carry it under; they are bound, therefore, to carry the road over the railway.)

Sect. 16 of the Railways Clauses Consolidation Act, 1845, gives them the power to alter any of their works.

(MAULE, J.: Perhaps, under that section, they could make a tunnel under the railway; but I doubt whether that would amount to carrying the railroad over the road by a bridge.)

Sect. 46 gives two alternatives when a railway crosses a road not on a level. The Company, therefore, must carry the railway across the road before their right of option accrues; and they are then, as in the present case, though not before, competent to adopt which of the two methods they may prefer. It cannot, therefore, be said that the act of carrying the railway across the road by a cutting determines their option.

(MARTIN, B.: I think they are bound, by sect. 46, to make the bridge when they cross the road.

MAULE, J.: At all events they are bound, by sect. 53, to make a new temporary road.)

Not having done so, they are perhaps indictable for a nuisance, until a bridge is built, according to *Reg.* v. *Scott* (1); but they may still build the bridge in whichever of the two methods they choose; and may, under sect. 16, alter any of their works for that purpose.

Cur. adv. vult.

PARKE, B. now delivered the judgment of the COURT:

After stating the material parts of the record, the learned Judge proceeded as follows.

[*492]

On the part of the plaintiffs in error it was argued *that the *mandamus* was bad, because, by the Railways Clauses Consolidation Act, 1845 (stat. 8 & 9 Vict. c. 20), s. 46, the Railway Companies had, in every case where the line of railway crosses a public highway not on a level (where no other provision was made by the

(1) 61 R. R. 309 (3 Q. B. 543).

special Act; and there was none in this case), an option to carry the highway over the railway, or the railway over the highway, by a bridge; and this *mandamus*, by ordering the Company to cause the public highway to be carried over the railway, deprived the Company of the option which the Act of Parliament gave them.

Two answers were offered by the learned counsel for the defendant in error.

First: that by stat. 8 & 9 Vict. c. 20, s. 46, no such option was given. Secondly: if it was, that from the facts stated on the face of the *mandamus* it was to be collected that it had been already exercised, and that no other alternative now existed but the construction of a bridge to carry the highway over the railway.

As to the first answer, we have no difficulty in saying that the Act of Parliament gave an option to the Company. *Mr. Needham* contended that the proper construction of the 46th section was, that, if the highway was above the level of the line of railway, a bridge was to be made for it over the railway; if below, for the railway over it. But this is not the ordinary meaning of the language contained in the clause, which, according to the usual rule of construction, directs either one thing or the other to be done, which is a case of election, when, according to the rule of law, the party to do the act is to have the choice which act he will do. *And there is very good reason for that construction; for it [*493] would be hard, if the way was only a few inches below the line, to force in all cases the Company to make a bridge for the railway over it, or *vice versâ*: and how would it be if the highway was on a declivity, and above on one side, and below on the other, the line of the railway? We have no doubt that the Legislature meant what they have said, that in such a case the Company were to judge for themselves; thinking that they would determine what was best according to the varying circumstances in which the choice would have to be made.

The next answer was, that, allowing the option to have been given by the statute, it had been exercised, and no other course was now open to the Company than to make the bridge for the highway over the railway. It was said that the Company had cut through the way by a deep trench; and, though the allegation that it was twenty feet deep might not bind the Company, and therefore was not to be assumed as an admitted fact, yet that it was admitted that the line of railway was carried through that trench, and the permanent way thereof laid down therein, and the public highway

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destroyed; and that, when the highway is destroyed and no longer exists, and the permanent way is laid down, the option is at an end.

It is on this part of the case that we have entertained some doubt: but our opinion is, that enough does not appear to determine the option clearly given to the Company in the first instance.

Whether the cutting the road was an indictable misdemeanour
[*494] or not, must depend upon a fact of which *we can take no notice, namely, whether a new temporary road was made, before the trench was dug, as it certainly ought to have been by sect. 53. One may conjecture that it was not, because the Company appear to have acted as if the road intersected was not a highway, and therefore probably did not make the new road required by the Act in such a case: but, judging from the record, it is only a conjecture; and the fact does not appear one way or the other.

But, even if the deep cut were a public nuisance and indictable, it does not follow that the option was determined. It would be competent, for anything that appears to the contrary, so far as relates to the injury to the road by interrupting it by means of a trench, to restore the communication by a bridge over the highway or over the railroad.

It is then said that the option is determined by laying down the permanent rail in the trench. But we think that, though the rail may be intended, when laid down, to be permanent, it would be permitted to the Company to take it up afterwards and carry the railroad over the highway, if they found it more convenient. Under the 16th section they have the power from time to time to alter their works or any of them, and substitute others in their stead, and do all other acts necessary for altering the railway.

But it is said that, under sect. 46, they are precluded from carrying their railway over a road except by a bridge constructed whilst the road exists as such; and, if they first destroy the road, they put an end to the power of so doing. We do not think that they are precluded from carrying their railway over the road by a
[*495] bridge except whilst it exists as a road, any more than *they are precluded from carrying the road over a railway except when the railway exists as such. The section does not, we think, mean that the railway shall be carried over when first made, but merely that it shall be constructed so as to pass or be over it.

We are of opinion, therefore, that there is nothing stated on this

record which shows that the Company's option is at an end: and, as the option clearly did exist at one time, we think the *mandamus* is bad; and that the judgment ought to be reversed, and judgment given to quash the *mandamus*.

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Judgment reversed.
Mandamus to be quashed.

IN THE QUEEN'S BENCH.

THOMAS HYATT *v.* GRIFFITHS.

1851. *Nov.* 6.

(17 Q. B. 505—509.)

[505]

A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy. Whether he does hold on any of such terms or not is a question for the jury on the facts proved.

A covenant in a lease for years ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres) at the seed time next after the end of the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing &c. till a day named, is a term which may be made incident to a tenancy from year to year.

TRESPASS. 1st count for cutting down, reaping and mowing plaintiff's growing wheat: 2nd count for taking and carrying away the goods and chattels, viz. 1,000 loads of unthreshed wheat, and 1,000 loads of straw, of the plaintiff. Pleas: 1. Not guilty. 2. That the wheat was not the wheat of plaintiff. 3. That the goods in the 2nd count mentioned were not the goods of plaintiff. Issues thereon.

On the trial, before Erle, J., at the Gloucester Summer Assizes, 1851, it appeared that, on 31st August, 1839, Sir Thomas Phillipps, under whom the defendant acted in the alleged trespasses, demised the land on which the wheat in question grew (containing 213 acres, 1 rood, 29 perches) to the plaintiff and his son William Hyatt for the term of four years from Michaelmas then next, at the yearly rent of 305*l.*, payable on *the usual quarter days. The [*506] lease contained various farming and other covenants, and among them the following:

"And the said Sir T. Phillipps doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said T. Hyatt and W. Hyatt, their executors and administrators, in manner following, viz.: That they the said T. Hyatt and W. Hyatt, their executors and administrators, shall and may retain

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and sow forty acres of wheat on the arable land hereby demised at the seedness next after the said term of four years, and to have the standing thereof until the harvest then next following, without paying any rent or making any other consideration for the same, and shall and may have the use of a convenient part in the said messuage, tenement or farm house for a servant or two to dwell and lodge therein for the purpose of attending to the threshing out and spending of such crop of wheat. And also convenient room in the said demised barn, stables and yards on the said premises to lay, set and thresh the said wheat crop, and for consuming the straw, chaff and colder arising therefrom, until the 2nd day of February next after the end of such harvest as aforesaid, with free liberty for them and their servants to go and return therefrom, with horses, carriages or otherwise, until the said 2nd day of February." Plaintiff's brother had previously held the lands as tenant to a Mr. Coventry, from whom Sir T. Phillipps purchased, under a 21 years' lease containing a similar covenant, and had made over his interest to the plaintiff, who held as a yearly tenant from the expiration of that lease, in 1833, till the granting of the four years' lease above mentioned. The holding for 21 years was a holding from Lady Day.

[507] While the four years' lease was running, William Hyatt, the son, made over his interest to the plaintiff. The lease expired at Michaelmas, 1843; but the plaintiff continued his occupation as tenant from year to year, at the same rent. At Lady Day, 1849, he gave notice of his intention to quit the premises (describing the land as 213a. 1r. 29p.) at the ensuing Michaelmas (1); and in October, 1849, he sowed the wheat now in question upon forty acres of the land. The residue was given up to the landlord (2). At the

(1) The notice ended: "All which said hereditaments" &c. "are situate" &c., "and were comprised in and described by a certain indenture of lease dated the 31st day of August, 1839, and expressed to be made between Sir Thomas Phillipps, Baronet, of the one part, and Thomas Hyatt and William Hyatt, both of Snowshill aforesaid, farmers, of the other part, and which said hereditaments and premises I now hold of you as tenant from year to year. Dated" &c.

(2) There had been some transaction upon the expiration of the tenancy, by which, as Sir T. Phillipps at that time contended, the plaintiff again became tenant. The plaintiff, however, denied this, alleging that he retained no interest in the land except his right to the wheat crop on forty acres; and evidence was given for the plaintiff that he had made this statement in the presence of Sir T. Phillipps, when the parties were before magistrates upon summons, on a dispute as to the liability to rate for lands comprising the forty acres; and that Sir T. Phillipps did not contradict it.

ensuing harvest the wheat was claimed on the part of Sir T. Phillipps; but the plaintiff alleged that the right to it was in him; for that, notwithstanding the expiration of the tenancy, the clause as to sowing and reaping in the lease of 1839 was impliedly kept up as a term of the demise from year to year. The defendant, on behalf of Sir T. Phillipps, reaped the corn; which was the trespass complained of.

The learned Judge stated to the jury that a tenant who holds over after the expiration of a lease may be taken to hold on such covenants of the expired lease *as are applicable to a tenancy from [*508] year to year: that, whether he does so or not in a particular case is a question of fact: that his Lordship was not prepared to say that the covenant in question was not applicable to a yearly tenancy: and that the question he should leave to them was, whether, though there was no express evidence of any terms of demise from year to year, they concluded, from the facts proved, that Sir T. Phillipps demised, and the plaintiff accepted, the lands on the terms alleged by the plaintiff as to the forty acres. His Lordship reserved leave to move to enter a verdict for the defendant if the Court should think that there was no legal evidence from which a demise on these terms could be inferred. Verdict for plaintiff.

Keating now moved that a verdict might be entered for the defendant, or a new trial had:

Effect ought not to have been given to the covenant relied upon by the plaintiff in the lease of 1839. Such a covenant is not incident to a yearly tenancy. If any covenant for a way-going crop could be considered so, the supposition could arise only in the case of a Lady Day holding. It is to such holdings that the term as to way-going crops is usually annexed, not to holdings from Michaelmas.

(ERLE, J.: The present covenant was expressly made in the demise of 1839, though the holding was then to run from Michaelmas instead of Lady Day.

LORD CAMPBELL, Ch. J.: Without laying down a general rule, we are to consider, on the case before us, what was the contract between the parties as to extending the incidents of the prior tenancy for four years to the new tenancy from year to year.

ERLE, J.: I thought the point was, whether the term in question

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could be one *incidental to a yearly tenancy. But I desired the jury to say whether in fact it had been made so in this instance; reserving leave to move to enter a verdict for the defendant if there was no evidence on which the jury could find that it had.)

LORD CAMPBELL, Ch. J.:

If such a term is not inconsistent with a tenancy from year to year, it may be shown by evidence to have been annexed to such a tenancy. It appears that this was: and I think the verdict is right.

PATTESON, J.:

When it is said that a party becoming tenant from year to year may be deemed to hold over on the terms of a prior lease for years, that cannot be confined to such terms as are necessarily incident to a yearly tenancy: the rule would then have no meaning. It must include such terms as may be incident.

ERLE, J. (1) concurred.

Rule refused.

1851. *Nov.* 8.

[512]

EAST LONDON WATERWORKS COMPANY *v.* TRUSTEES FOR MILE END OLD TOWN.

(17 Q. B. 512—523; S. C. 21 L. J. M. C. 49; 17 Jur. 121.)

By an Act for lighting and improving a district, rates for all the purposes of the Act were to be laid upon every person and persons who should "inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments, situate or being in any of the streets, squares, lanes, and other public passages and places" within the district, according to the yearly value; so as all such rates for lighting the district should be laid upon such persons as should inhabit, hold, &c. "any messuages, tenements," &c., "or other buildings, tenements or hereditaments" situate in such of the streets &c. only, within the district, as should from time to time be lighted by virtue of the Act:

Held, That a Water Company within the district were not liable to be assessed under this Act for their mains and other pipes, plugs and apparatus used for the conveyance of water, and part of which ran underground through the public streets and places.

ON appeal against a rate made by the respondents upon certain property of the appellants within their district, under a local Act of Parliament, the Sessions confirmed the rate, subject to the opinion of this Court upon the following case.

The respondents are the trustees under a local Act passed &c.

(1) No fourth Judge was present.

(1 & 2 Geo. IV. c. lxxii., local and personal, public, for lighting and improving the hamlet of Mile End Old Town, Middlesex (1)): and the question *arises as to the liability of the appellants to be rated for their mains &c. under the terms of that statute. The purposes and objects of the Act are explained in the preamble and the first section, which appoints the first trustees. The 6th section authorizes the election of future trustees (2) by the rated inhabited householders.

[*513]

The 30th section, which authorizes the making of the rate, is as follows:

"And be it further enacted, That for all and every the purposes of this Act, the said trustees shall and they are hereby authorized and required to raise from time to time, by rates or assessments, such sum and sums of money as they the said trustees, or any five or more of them, shall from time to time judge necessary; all which rates and assessments shall be signed by any five or more of the said trustees, and shall be laid upon all and every person and persons who do or shall inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments, situate or being in any of the streets, squares, lanes, and other public passages and places within the said hamlet, according to the yearly value of the same respectively; and the first year for which such rates or assessments shall be made, shall commence and be computed from the 24th day of June, 1821; and such rates or assessments shall and may be made and collected half yearly or quarterly, as the said trustees shall at any *of their meetings think proper, and shall from time to time direct, so as such rates or assessments do not exceed in the whole for any one year (for the several purposes of this Act) the sum of 1*s.* in the pound; and so as all such rates and assessments, from and after the making of the first rate and assessment hereby directed

[*514]

(1) "An Act to light and otherwise improve the streets and other public passages and places within the hamlet of Mile End Old Town, in the parish of St. Dunstan, Stepney, otherwise Stebonheath, in the county of Middlesex."

(2) By sect. 3, no person (with exceptions not material here) is eligible to be trustee, "unless he shall be resident in the said hamlet, and shall occupy and be in possession of one entire messuage or tenement within the said hamlet, of the rent or value of 20*l.* per annum," and be rated to the poor, in respect of such messuage or tenement, on that sum or upwards. Sects. 24 and 86, referred to in the course of the argument, do not require further notice here.

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to be made, for lighting the said hamlet, shall be laid upon all and every person and persons who do or shall inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coachhouses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements or hereditaments, situate and being in such of the streets, squares, lanes, and other public passages and places only, within the said hamlet, as shall from time to time be lighted by virtue of this Act."

The appellants have been for upwards of twenty years, and still are, the occupiers of certain water-works and premises situate in the county of Middlesex; and a portion of their mains and pipes run under ground through the public streets and roads and public places of the hamlet of Mile End Old Town; and in the said hamlet they have used, occupied and enjoyed, and still use, occupy and enjoy, exclusively the said mains and pipes and also the plugs and turncocks fixed in the ground, and which are used in the manner hereinafter mentioned, and for which occupation the appellants are and always have been assessed in the rates raised within the said hamlet for the relief of the poor pursuant to the statute of Elizabeth, and have duly paid such assessments.

The Company use the said mains and other pipes, plugs and turncocks, and which are those mentioned in the rate hereinafter mentioned, to supply water to inhabitants of dwelling-houses
[*515] and occupiers of other *real property in the said public streets and roads and public places in the said hamlet, and in part to convey water from the principal station and works of the said Company at Old Ford in the parish of Saint Mary Stratford Bow in the county of Middlesex through the said hamlet of Mile End Old Town into various other parishes in which such water is supplied to occupiers of real property, situate in such parishes respectively, by the said Company.

The appellants were never rated under the said local Act for their mains &c. in the said hamlet, from the time of the passing of the said Act until the making of the rate hereinafter next mentioned.

The said trustees on the 2nd day of January, 1850, made and published a rate as follows: "A rate or assessment of 6*d.* in the pound for one half year from Midsummer, 1849, to Christmas, 1849, made by the trustees for lighting and improving the hamlet of Mile End Old Town, pursuant to an Act" &c. (1 & 2 Geo. IV. c. lxxii.), "intituled" &c., "for all and every person or persons liable to be rated and assessed pursuant to the provisions of the

said Act; and which said rate or assessment is contained in two books, whereof this book is the first."

The said Company were rated in the said books as follows:

151, Mile End Road North.

£3,000	The Company of Proprietors of the East London Water Works for their mains and other pipes, plugs and apparatus fixed in the ground and used for the conveyance of water in the several streets, roads and public places in the said hamlet.	£75

For the purposes of the present case the amount and form of the assessment, if the Company be rateable, are not in dispute. [516]

The question for the decision of the Court is: Whether the occupation of the property as before mentioned in the said hamlet, or the said Company in respect thereof, or of the space which the said mains, pipes, plugs and turncocks occupy, is or are rateable within the said 30th section of the local Act. If the Court shall be of opinion that they are so rateable, the rate upon the appellants to stand confirmed; otherwise the same rate to be quashed as to the said assessment upon the appellants, and to be amended by striking such assessment out of the rate.

After the trial of the appeal, it was discovered by the parties that the writ of *certiorari* was taken away by the statute above mentioned. Whereupon, in order properly to bring the question so reserved as aforesaid before the Court of Queen's Bench, it was agreed by the appellants and respondents to state the foregoing facts in the form of a special case &c. (case to be stated under a Judge's order, pursuant to stat. 12 & 13 Vict. c. 45, s. 11).

The case then stated that such order was duly obtained, and it was agreed by the said parties that a judgment in conformity with the decision of the Court of Queen's Bench might be entered on motion by either party at the Sessions next or next but one after such decision. The case was now argued, on a *concilium*.

Pashley, for the respondents:

The property is rateable under sect. 30. The word "tenements" appears there twice. Where it first occurs ("messuages, tenements, *coach-houses," &c.) it may mean tenements in the popular sense, [*517] namely habitations, and particularly those of an inferior class. But when the word is used a second time in the same sentence ("or other buildings, tenements or hereditaments") it must have a wider meaning, and include all tenements whatever of a corporeal

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nature; everything, at least, that is a subject of assessment under stat. 43 Eliz. c. 2, s. 1. The principle of construction appears by comparison of *Rex* v. *The Trustees for paving Shrewsbury* (1) with *Rex* v. *The Manchester and Salford Waterworks Company* (2) and *Colebrooke* v. *Tickell* (3).

Bovill, contrà:

It is admitted on the other side that the word "tenements" is not to be construed in the fullest legal sense; the question is, to what corporeal subject-matters it is limited. "Other tenements" must be taken to mean tenements *ejusdem generis* with those before enumerated: and "tenements," where it first occurs, is coupled with "messuages," and clearly means, if not the same thing, something of the same description. The word "or," connecting "tenements" with "buildings" and "hereditaments," implies that the terms are used as synonymous. The Act is a Paving and Lighting Act; its objects are the security of persons and of property connected with the purpose of habitation. This shows the description of property on which the assessment under the Act ought to fall. The liability should follow the benefit. A trustee under this Act is elected by the inhabitant householders, and must himself be
[*518] resident, and possessed of an "entire messuage or *tenement:" sect. 3. "Mains and pipes," the property of Water Companies, are expressly noticed in sect. 24 (4), and would have been distinctly mentioned or alluded to in sect. 30, if contemplated. In the exempting clause, sect. 86, in favour of certain roads, messuages and building buildings or tenements are enumerated in conjunction with other kinds of property; but nothing is said which points at the kind now in question more distinctly than the words of sect. 30 *Rex* v. *The Manchester and Salford Waterworks Company* (5) (decided soon after the passing of stat. 1 & 2 Geo. IV. c. lxxii.) turned upon words very like those now in question: it was observed by the COURT that the local Act there did not, like stat. 43 Eliz. c. 2, use the word "lands," but it mentioned "tenements" in association with words which denoted buildings, and "gardens or garden grounds" were specified separately. The clause, therefore, was held not to include the Company's pipes and trunks. It was remarked there that the subjects of rate specifically mentioned were such as

(1) 37 R. R. 409 (3 B. & Ad. 216).
(2) 1 B. & C. 631.
(3) 43 R. R. 520 (4 Ad. & El. 916).
(4) Regulating the processes for supply of water from the pipes in time of frost.
(5) 1 B. & C. 630.

derived protection from the lighting and watching which were the purposes of the Act. The whole argument applies to this case.

(LORD CAMPBELL, Ch. J. referred to the last clause: "And so as" &c., of stat. 1 & 2 Geo IV. c. lxxii. s. 30.)

If the pipes here are rateable because they occupy land, and so make their proprietors occupiers of lands with the meaning of stat. 43 Eliz. c. 2, s. 1, it may obviously be asked why the present statute does not mention lands. It would have been easy to express in terms, if it had been so meant, that all corporeal *hereditaments [*519] should be assessed.

(PATTESON, J.: Does the case say that these pipes run through streets actually lighted?)

There is no dispute as to that. *The Manchester and Salford* (1) case was followed by *Rex* v. *Mosley* (2), a decision on the same Act, where the COURT again construed "tenements" as referring to things *ejusdem generis* with those before mentioned. In *Constables &c. of Chorlton* v. *Walker* (3) the word "hereditaments" was interpreted, not according to its strict legal sense, but to the context, and the purposes of the Act. On the other hand, a more extended sense was given to the word "hereditaments" in *Rex* v. *The Trustees for paving Shrewsbury* (4), by reason of words in the same clause from which the larger meaning was inferred: but the decision in *Rex* v. *The Manchester and Salford Waterworks Company* (1) was not impeached. The same rules of construction were followed in *Colebrooke* v. *Tickell* (5) and *Reg.* v. *Nevill* (6), in which last case Lord DENMAN relied strongly upon the principle enforced by Lord TENTERDEN in *Sandiman* v. *Breach* (7), that general words following particular ones apply only to things *ejusdem generis*. It has lately been held, in *Chelsea Waterworks Company* v. *Bowley* (8), that the occupation of ground by water-pipes was not land or hereditaments rateable to the land tax under stat. 38 Geo. III. c. 5. The present case states that the property now in question has never been rated to the poor since the local Act passed; and this, though no legal ground of exemption, is a *contemporanea expositio* *which the [*520]

(1) 1 B. & C. 630.
(2) 26 R. R. 328 (2 B. & C. 226).
(3) 10 M. & W. 742.
(4) 57 R. R. 409 (3 B. & Ad. 216).
(5) 43 R. R. 520 (4 Ad. & El. 916).
(6) 70 R. R. 538 (8 Q. B. 452).
(7) 31 R. R. 109 (7 B. & C. 96).
(8) *Ante*, p. 482 (17 Q. B. 358).

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Court may properly notice. TINDAL, Ch. J. allowed weight to such a consideration in *The Bank of England* v. *Anderson* (1).

(LORD CAMPBELL, Ch. J.: The words at the end of sect. 30, confining the assessment to property situated in places which are lighted by virtue of the Act, are very material.)

Pashley, in reply (2):

In *Rex* v. *The Manchester and Salford Waterworks Company* (3) the word "tenement" was repeatedly used in the local Act in a manner which showed that a dwelling-place or building was contemplated; and lands were not made a subject of rate, though "gardens or garden ground" were expressly mentioned. In *Colbrooke* v. *Tickell* (4) every Judge present was of opinion that the term "hereditaments" was, by the wording of the Act, appropriated to such as were corporeal and local. "Messuage or tenement," here, cannot be taken to signify that the two things are identical, or even *ejusdem generis*. In *Constables &c. of Chorlton* v. *Walker* (5) the local Act differed from this: the words "houses, buildings, ground, or land" were unambiguous. It is said that, in *Rex* v. *The Trustees for paving Shrewsbury* (6), the extended sense was given to the word "hereditaments" by reason of the exception, which followed, of "meadow and pasture ground:" but it seems by the language of the COURT, that, even without that exception, the construction might have been the same.

(LORD CAMPBELL, Ch. J.: Surely the COURT relied on the exception as proving the rule.)

[*521] In *Chelsea *Waterworks Company* v. *Bowley* (7) the COURT seem to have relied upon the assumed intention, in the Land Tax Acts, to affect "property to be let by a landlord to a tenant." The Act 43 Eliz. c. 2, s. 1, taxes "every occupier of lands:" and the words of the present statute are, who shall "hold, use, occupy, be in possession of, or enjoy."

(LORD CAMPBELL, Ch. J.: "Tenants and occupiers" were mentioned in *The Manchester* case (3).)

(1) 44 R. R. 271 (3 Bing. N. C. 589, 666; 2 Keen, 328).
(2) *Bovill* objected to his being heard in reply, on a case from Sessions; but the COURT permitted it.
(3) 1 B. & C. 630.
(4) 43 R. R. 520 (4 Ad. & El. 916).
(5) 10 M. & W. 742.
(6) 37 R. R. 409 (3 B. & Ad. 216).
(7) *Ante*, pp. 482, 484 (17 Q. B. 358, 361).

Previous decisions cannot govern absolutely in the construction of local Acts: each must be interpreted according to its own circumstances. No sound conclusion can be drawn from the mere omission, though for many years, to rate a particular property.

(LORD CAMPBELL, Ch. J.: Where the words of a statute are quite clear, that is so.)

Words ought to be very clear to set aside the statute of Elizabeth.

LORD CAMPBELL, Ch. J.:

The appellants are rated for "their mains and other pipes, plugs and apparatus fixed in the ground and used for the conveyance of water in the several streets, roads and public places" in the hamlet of Mile End Old Town: and the question is, whether they are liable in respect of that property. I think they are not. Though proprietors of certain subject-matters which may be called "tenements," they are not liable in respect of them, on a due construction of this Act. Under the statute of Elizabeth they would, no doubt, be so; but that is framed in very different language. We have here a particular enumeration of the subjects of assessment, "messuages, tenements, coachhouses, stables, cellars, vaults, houses, shops, warehouses," followed by the *words "or other buildings, tenements [*522] or hereditaments." "Tenements" must be understood according to the antecedent enumeration, and as comprising only matters *ejusdem generis*. That rule of construction was followed in *Rex* v. *The Manchester and Salford Waterworks Company* (1), which is admitted to have been well decided, and is a case not distinguishable from this except that it is, if anything, stronger: for there the assessment was to be laid on some things not coming within the description of buildings. Here all the things in the precedent enumeration are of that description: and there is no exception, as there was in *The Manchester* case (1), to give the particular word a sense beyond that of matters *ejusdem generis*. Had things of the same class of property with pipes been so excepted, it might have been said "*exceptio probat regulam.*" The mere circumstance, that the property has not hitherto been rated, would not be conclusive here, though in the construction of a doubtful Act of Parliament *contemporanea expositio* might have weight.

PATTESON, J.:

This case must be governed by *Rex* v. *The Manchester and Salford*

(1) 1 B. & C. 630.

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Waterworks Company (1) and *Rex* v. *Mosley* (2). I agree in all the reasoning of the COURT in the former case, which was decided about the time when the present Act passed. And I cannot help thinking that the provision in this Act, that the assessment shall be laid only on occupiers of property in streets &c. lighted by virtue of the Act, shows an intention to lay the rate only on property which derives [*523] benefit from the duties performed under that *Act. *Rex* v. *The Trustees for paving Shrewsbury* (3) is the only case which seems contradictory to those first cited; but there the extended sense of the word "hereditaments" was inferred from the particular exception. *Reg.* v. *Nevill* (4) differs from this case. There was a Buckinghamshire case (5) in which tithes were held liable to rate under a local Act; but there the Act spoke expressly of tenements and hereditaments rateable to the poor. That is not so here. Both on principle and on the decisions, I think the assessment not maintainable.

COLERIDGE, J. (6):

I am of the same opinion, on principle and on the cases. If the appellants are liable, it is because they occupy a "tenement" which is rateable. It is admitted that the word cannot have its full meaning in either place where it occurs in sect. 30. In the first it clearly means something inhabited or belonging to a dwelling. In the second, where it is conceded that some restraint must be put upon the construction of the word, the rule attaches, that a general word following specific ones must be taken to mean something of the same kind. The pipes here are, in some sense, a thing "situate and being" in the "streets." But the "messuages" and other matters enumerated in terms are all things which may form part of the side of a street, and which are capable of being benefited by lighting under the Act.

Judgment for appellants (7).

(1) 1 B. & C. 630.
(2) 26 R. R. 328 (2 B. & C. 226).
(3) 37 R. R. 409 (3 B. & Ad. 216).
(4) 70 R. R. 538 (8 Q. B. 452).
(5) 45 R. R. 502 (see *Rex* v. *Barker*, 6 Ad. & El. 388).
(6) Only three Judges were present.
(7) See *Reg.* v. *East London Waterworks Company*, 18 Q. B. 705, where the Company were held liable to assessment under a Paving Act.

MUCH HOOLE *v.* PRESTON (1).

1851. *Nov.* 12.

(17 Q. B. 548—561; S. C. (sub nom. *Reg.* v. *Much Hoole*) 21 L. J. M. C. 1; 15 Jur. 1152.)

[548]

An Irishman, having no English settlement, married a woman settled in A., and lived with her in B. for more than five years. He then deserted her and left the kingdom:

Held that she was removeable from B. to A., not to Ireland.

On notice of appeal against an order of two justices for the removal of Ann Ward, wife of Michael Ward, and her six children, from the township of Preston to that of Much Hoole, both in the county of Lancaster, a case, in effect as follows, was stated, by consent and by order of a Judge under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court.

Michael Ward, the husband of the pauper Ann Ward, is an Irishman, and has not acquired any settlement in England. In the month of May, 1836, the said Michael Ward married the said Ann Ward, who then had, and still has, a maiden settlement in the township of Much Hoole. The several children mentioned in the said order are the lawful issue of the said Michael Ward and Ann his wife. The said Michael Ward, and Ann his wife, have respectively resided more than five years, next before the 16th of November, 1849, in the said township of Preston; and they, and their said family, were then irremoveable therefrom. On the said 16th of November, 1849, Michael Ward deserted his said wife and family, and went to America, and has not since returned to them: and they continued to reside in the said parish of Preston up to the time of the application for the warrant for their removal, and *still continue to reside therein. Such [*549] warrant or order was obtained in consequence of the said Ann Ward and her children having become chargeable to the said township of Preston through poverty, and not from sickness or accident.

The question for the opinion of the Court is, whether the said Ann Ward and her said children were irremoveable from the said township of Preston; and, if not, whether the said Ann Ward and her said children, or any of them, and which, were removeable to the maiden settlement of the said Ann Ward. If the Court should be of opinion that the said paupers were irremoveable, or that they are not removeable to the maiden settlement of Ann Ward, then judgment quashing the said order was to be entered at the Sessions. If the Court should be of opinion that the said paupers or any of them were removeable to the maiden settlement of the said Ann Ward,

(1) Cited, *West Ham Guardians* v. *Churchwardens of St. Matthew, Bethnal Green* [1894] A.C. 230, 237.

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then judgment confirming the said order as to such of them as were so removeable was to be entered at the Sessions accordingly.

Pashley, in support of the order of removal:

The first question is, whether there was such a disruption of Michael Ward's residence as to deprive him of his status of irremoveability. The absence is a disruption, unless there is something to show an *animus revertendi*: *Reg.* v. *Llanelly* (1). In that case the Sessions had negatived the disruption and quashed the order, so that it lay on the respondents to satisfy this Court that there was no evidence of an *animus revertendi*; yet the
[*550] COURT held the removeability proved. *Then, the husband is an Irishman, having no English settlement; but as he has deserted his wife and family they are to be removed to her settlement: *Rex* v. *Cottingham* (2). Stat. 8 & 9 Vict. c. 117, makes no difference: *Reg.* v. *All Saints, Derby* (3). Stat. 9 & 10 Vict. c. 66, s. 1, concludes with a proviso, for which another proviso is substituted by stat. 11 & 12 Vict. c. 111, s. 1; but that does not affect the place to which the wife and children are removeable if they have a settlement.

Overend, contrà:

The husband, if he came back, would be removeable, as there has been a disruption in his residence. But there has been none in the wife's. If she had no settlement of her own, she would be within the proviso; but, as it is, she is within the enacting part, but not within the proviso.

(LORD CAMPBELL, Ch. J.: It seems a strange enactment that a woman should not be removeable because she has a settlement. Has that construction ever been put upon the Act?)

At all events, if she is removeable, it is to Ireland.

Pashley was heard in reply.

LORD CAMPBELL, Ch. J.:

The proviso is not artificially expressed: but, reading it with the other provisions of the statute, I think the meaning appears to be, that a wife, left in such circumstances as the present, is not irremoveable. Then, if she be removeable at all, it must be to her maiden settlement; it can be to no place else.

PATTESON, J.:

[*551] *Rex* v. *Cottingham* (2) leaves no doubt *that, before stat. 9 & 10

(1) *Ante*, p. 329 (17 Q. B. 40).
(2) 7 B. & C. 615.
(3) 80 R. R. 246 (14 Q. B. 207).

Vict. c. 66, this woman would have been removeable to her maiden settlement. And I think she must be so still; but I own I cannot construe the Act.

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WIGHTMAN, J.:

If the husband came back he would be removeable, and his wife and children with him. Then his desertion does not render them irremoveable. She may be removed somewhere; and the authorities show that it is to her maiden settlement.

ERLE, J.:

I did not hear the whole argument; but I concur in the judgment.

Judgment for the respondents.

REG. *v.* THE INHABITANTS OF KENTMERE (1).

1851. *Nov.* 12, 13.

(17 Q. B. 551—562; S. C. 21 L. J. M. C. 13; 16 Jur. 265.)

[551]

By a local Act, reciting that it was expedient to form reservoirs on the river K. for the purpose of affording a more regular supply of water to the mills on its banks, and by means thereof cleansing the stream and improving the health of those resident on its banks, the occupants of mills on the river K. were made Commissioners for making reservoirs; and the said Commissioners were authorized to make and maintain reservoirs, and to levy a water rate on all mills using the water, for the purposes of defraying the expenses of the Act, and maintaining the reservoirs.

The Commissioners made a reservoir occupying forty-eight acres, entirely situate in the township of K. The mills benefited were situate in eight other townships. The overseers of K. rated the Commissioners as occupants of land. On appeal, the Sessions stated the above facts in a case, in which they found, as a fact, that, if the works occupied by the Commissioners had been a private undertaking, belonging to persons who had increased the available supply of water by means of the reservoir as the Commissioners had done, and who could allow or refuse the millowners the benefit of such increased supply, and charge them for it, the assessed value would be a fair one:

Held, That the Commissioners had a beneficial occupation; and were rateable: and That, on the above finding, the *quantum* of the assessment was right.

ON appeal, by the Commissioners of the Kendal Reservoirs, against a rate for the relief of the poor *of the township of Kentmere, in the county of Westmoreland, the Sessions quashed the rate, subject to the opinion of this Court on the following case.

[*552]

The appellants are constituted the Commissioners of the Kendal

(1) See *Worcester Corporation* v. *Droitwich Assessment Committee* (1876) 2 Ex. D. 49, 46 L. J. M. C. 241, and Ryde on Rating, pp. 293—304, 2nd ed. —A. C.

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Reservoirs, by stat. 8 & 9 Vict. c. cxl. (1): and, under the provisions of that statute, they have constructed a reservoir at the head of the vale of Kentmere, on the stream called the Kent, in the respondent township, by placing an embankment across the *course of the stream, and so impounding the water above the embankment, the flow from the stream passing through a pipe in the embankment; and, in so carrying out the statute, they have expended upwards of 12,000*l*. The land on which the reservoir is constructed is in quantity upwards of forty-eight acres, is wholly situate in the respondent township of Kentmere, and was purchased by the Commissioners for the sum of 1,040*l*., and was, previous to such purchase, of the net annual rateable value of 12*l*. In this reservoir is collected a portion of the surplus water of the river Kent, which would otherwise flow down it, and cause floods over the adjoining lands in certain seasons: and this collected water is allowed again to flow into and down the river as required for the purposes of the mills and manufactories on the said river. The result obtained is a more regular and convenient supply of water to such mills and manufactories, and thereby an increased regularity in the motive

[*553]

(1) (Local and personal, public), "For making and maintaining reservoirs in the parish of Kendal in the county of Westmoreland."

Sect. 1 recites that it is expedient that reservoirs should be constructed at the sources of certain streams, amongst others, the Kent, "for the purpose of affording a better and more regular supply of water to the mills and manufactories upon the said streams respectively, and by means thereof of cleansing the said streams, and thereby promoting the health of the persons residing upon the banks of such streams."

Sect. 3, that certain persons named, "and all other persons who now are or hereafter shall be owners or occupiers of any fall of water, mill, or works upon the said streams or any of them of the annual value of 50*l*., and every person who is now or hereafter shall be a joint owner or occupier of any fall of water, mill, or works upon the said streams or any of them of the annual value of 80*l*. or upwards, liable to be rated by virtue of this Act, shall be and they are hereby declared to be 'The Commissioners of the Kendal Reservoirs.'"

Sect. 89 authorizes the Commissioners to levy rates "upon all occupiers of mills, factories or other premises now erected or hereafter to be erected upon or across the line or course of the said streams or any of them, who shall occupy or employ any fall of water now taken up or hereafter to be taken up, giving motion to any wheel, engine or other machinery, or affording any benefit or advantage to such mills, factories, or other premises situate between the site of the several reservoirs hereby authorised to be made respectively, and the junction of the waters therefrom with the sea" in proportion to the depth of fall occupied by them. Sect. 102 exempts from the rate corn mills not employing more than six pair of stones. Sect. 108 appropriates the moneys to be received by the Commissioners to maintaining the reservoirs, forming a reserve fund for extraordinary contingencies, and paying principal and interest on the money borrowed for the purposes of the Act.

power, whereby the said mills and manufactories are enabled to continue working at times when, without the reservoir, they would be compelled partially to cease working. The Kent runs, for a distance of upwards of one mile from the reservoir, in the respondent township, and afterwards runs through several other townships, each maintaining its own poor. The only mill situated in the respondent township is a very small mill, used solely for grinding corn, and exempt (by sect. 102 of stat. 8 & 9 Vict. c. cxl.) from the payment of the rates made under the above-mentioned statute. There are ten mills, lower down on the Kent, below the respondent township, benefited by the said reservoir, and rateable to the rates made under the said statute: the most distant of which mills from the *township of Kentmere is situate about sixteen miles from the [*554] said reservoir down the Kent; and the said ten mills are situate in eight of the townships through which the river passes. The Commissioners have, under the powers contained in the statute, levied rates in order to pay the interest on the money borrowed for the purpose of constructing the reservoir, and the necessary charges and expenses connected with its maintenance and carrying out the objects to which the rate is by the Act made applicable. For the year ending 1849, they so raised the sum of 697*l.* 11*s.* 10*d.*, and, for the year ending June, 1850, the sum of 825*l.* 3*s.*; which sums have been expended in making the said payments. The whole of the works of the Commissioners, and which consist of the said reservoir, are situate in the respondent township; and the water from the reservoir flows along the ancient bed of the river. The respondents have assessed the said Commissioners in the said rate or assessment, made on the 29th of May, 1850, as above mentioned, as occupiers of the said land and reservoir in the said township of Kentmere, at the sum of 9*l.* 8*s.* 6*d.*, being on a net rateable value of 377*l.* and a gross estimated rental of 444*l.*; and, on the hearing of the said appeal, it is admitted that the said rate or assessment is duly made, and valid in all respects, except only as to the rateability of the said Commissioners, and as to the amount at which they are rateable, if at all, in respect of the said land and reservoir. And it is also admitted that the appellants have duly appealed against the said rate or assessment, and raised the said two questions. It is admitted, for the purposes of this appeal and case, that, if the works constructed and carried on by the Commissioners had been a private *undertaking of any person or persons who had increased [*555] the available supply of water to the different mill owners as is done

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by the reservoir, and who, at pleasure, could allow or refuse the mill owners the benefit of such increased supply of water, and could charge them for such supply, the assessment would then be a fair and proper assessment on the occupiers of such reservoir. It is, however, contended by the appellants: First, that they are not rateable at all, inasmuch as the construction and maintenance of the reservoir under the said statute is a public undertaking, and their actual occupation of the said reservoir under the said statute is, necessarily, not such a beneficial occupation as to make them rateable to the poor in respect thereof; Secondly, that, if they are rateable, they are not to be rated as occupiers who are entitled to allow or refuse the benefit of the increased supply of water to the occupiers of mills, and to charge them for such supply, inasmuch as the only benefit produced by the construction of the said reservoir is enjoyed by the said several mills and manufactories, the value of which it admittedly increases, and the occupiers of which are liable to be assessed to the poor rates in their respective townships in respect of such increased value, and inasmuch as the Commissioners under the said Act are liable to be rated and assessed to the poor rates in each of the townships in which the mills and manufactories are situate, in respect of the rates payable to them, under sect. 89 of stat. 9 & 10 Vict. c. cxl., by the occupiers of such mills and manufactories. It is admitted that the rateable value of the land occupied by the appellants, as it existed at the time of the original construction of the reservoir, was the sum of 12*l.* only; and it is also admitted that 12*l.* would now be the *rateable value of the same land if the said reservoir had not been constructed.

[*556]

If the Court should be of opinion that the appellants are not rateable at all in respect of their occupation as above mentioned, the order of Sessions is to stand confirmed, or such other order is to be made in the premises, by striking out the assessment on the appellants, or otherwise, as to the Court may seem fit. And, if the Court shall be of opinion that the appellants are not rateable, as occupiers who at their pleasure could allow or refuse the mill-owners the benefit of such increased supply of water as aforesaid, and could charge them for such supply, then the amount of rate is to be ascertained on such principle as the Court shall determine. But, if the Court should be of a different opinion on each of the questions aforesaid, then and in such case the order of Sessions is to be quashed, and the rate appealed against is to be in all respects confirmed.

The case was argued in this Term (1).

Cowling, in support of the order of Sessions:

Stat. 8 & 9 Vict. c. cxl. was passed, as appears by sect. 1, to improve the river, partly for the sake of the mills and manufactories, and partly to promote the health of those residing on its banks. Sect. 3 makes the owners and occupiers of water privileges and mills, of a certain value, Commissioners; and in pursuance of their powers these Commissioners have made the reservoir in question. The expenses are, by sect. 89, to be defrayed by means of *a water rate, from which, by sect. 102, corn mills are exempted; [*557] and, by sect. 108, the proceeds of this are strictly appropriated to the purposes of the Act. That being so, the first question is, Are the Commissioners rateable at all? They occupy land which, by statute, they must occupy in a particular manner, so as to produce a benefit to the mills and works which are situated in other townships. It is a kind of easement to pen back the waters of the Kent, in this township, for the benefit of the townships below. They are not more rateable in respect of the enhanced value of these mills than the occupiers of land over which there was a right of way would be rateable in respect of the enhanced value of the dominant tenement. In *Rex* v. *The Aire and Calder Navigation* (2) Lord TENTERDEN asks: "Suppose water is turned into a canal from a river by means of a wear, are the profits of the canal to be rated where the wear is? If a wear in parish A. turns water to a mill in parish B., are the returns of the mill in B. to be rated in A.?" That is precisely the present case.

(LORD CAMPBELL, Ch. J.: But, where land is occupied, and used so that it produces profit, is it not rateable? As yet you are not speaking of the *quantum*: is there not to be some rate?

ERLE, J.: In *Rex* v. *The Aire and Calder Navigation* (3) the undertakers had no interest in the soil of the canal.)

No: but the question was as to the rateability of the dam; and the judgment of TAUNTON, J. is very closely in point.

Further, the Commissioners occupy for public purposes, and are therefore not rateable (4). They enjoy no benefit themselves as occupiers, but hold the land in trust for a *district embracing [*558]

(1) Wednesday, November 12th. Before Lord Campbell, Ch. J., Patteson, Wightman and Erle, JJ.

(2) 4 B. & Ad. 139, 141.

(3) 37 R. R. 363 (3 B. & Ad. 139).

(4) See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.

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many townships. It is at least as public a purpose as that in *Rex* v. *The Commissioners for lighting Beverley* (1).

Lastly, if a rate can be imposed at all, the rateable value must be very small, probably not more than nominal; the mills are to be rated in their respective townships for their value as enhanced by the water.

(LORD CAMPBELL, Ch. J.: But would not the poor rate on the Kentmere reservoir be recouped to the Commissioners by a water rate, and so fall ultimately on the occupiers of the mills?)

That would make it unfair on the occupiers of the mills. Their water rate would be a deduction from the assessable value in their own townships, and they would be allowed only a percentage upon that.

Pashley, contrà:

The Commissioners are rateable. *Reg.* v. *Longwood* (2) and *Reg.* v. *Badcock* (3) are precisely in point (4).

Then as to the *quantum:* the occupation of this land as a reservoir produces benefit, and is rateable for the amount of such benefit.

(ERLE, J.: Suppose a man occupies a mill worth 10*l.* a year in parish A., and is owner of a piece of land in parish B. also worth 10*l.* a year. Now, if the man turns his land in B. into a reservoir, so that the mill and reservoir become together worth 100*l.* a year, it is clear that 80*l.* a year of increased rateable value has been created; but is the 80*l.* to be rated with the mill in A., or with the reservoir in B.? Or is it to be apportioned? And, if so, on what principle?)

Cur. adv. vult.

[559] LORD CAMPBELL, Ch. J. now delivered judgment:

We are of opinion that the order of Sessions should be quashed, and the assessment appealed against confirmed. The first question is, Whether, in respect of the reservoirs and works described in the case, the appellants are rateable at all to the relief of the poor of the township of Kentmere. They contend that they are not, alleging that, although they are the owners and occupiers of land within the township, they are merely Commissioners appointed by Parliament for a public purpose. But, in truth, they must be

(1) 6 Ad. & El. 646.

(2) 13 Q. B. 116. [See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.]

(3) 6 Q. B. 787. [See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.]

(4) See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.

regarded as individuals who for their own benefit have obtained authority from Parliament to purchase land in Kentmere, which they use to obtain a better supply of water for their mills. Sanatory purposes are referred to in the Act of Parliament, as well as commercial; but the main object in view was evidently of a private nature. In *Reg.* v. *Longwood* (1), which very much resembles the present case, the Commissioners were bound to furnish water gratis in case of fire: but Lord DENMAN, in delivering the judgment of this Court, said, that those who were benefited by the improved supply of water were enabled by Parliament to obtain the supply through the medium of Commissioners, without the intervention of a Water Company; that this portion of the inhabitants stood in the position of an ordinary Water Company; and that they had no greater right to be exempt from rateability for the land occupied by them than such a Company would have had. In *The Beverley* case (2), relied upon by the appellants, the Commissioners manufactured the gas for the general benefit of the community (3).

More difficulty arises upon the *quantum* of the rate. But we [560] think we are relieved from this by the admission in the case "that, if the works constructed and carried on by the Commissioners had been a private undertaking of any person or persons who had increased the available supply of water to the different mill owners as is done by this reservoir, and who, at pleasure, could allow or refuse the mill owners the benefit of such increased supply of water, and could charge them for such supply, the assessment would then be a fair and proper assessment on the occupiers of such reservoir." According to what was laid down in *Reg.* v. *Longwood* (4), the appellants, who are all mill owners, and must be considered as representing the whole class to be benefited by the improved supply of water, are in the situation of a Water Company established for the same purpose. We do not see that any difference arises, for this purpose, from the Commissioners not being able at pleasure to allow or refuse the mill owners the benefit of such increased supply of water, and not being authorized to charge them for such supply. The amount of additional benefit derived by the mill owners from the reservoir is precisely the same as if they paid for the increased supply of water by the gallon; and

(1) 13 Q. B. 116. [See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.]

(2) 6 Ad. & El. 646.

(3) See *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.

(4) 13 Q. B. 116, 125.

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they in truth are assessed for the reservoir in the township of Kentmere; for the amount of this assessment must be included in the rate directly levied upon them by the Commissioners for the general purposes of the undertaking. The principle adopted in the assessment, in considering what it would be were the reservoir and works occupied by a Company who thereby increased the supply of water to the mill owners, seems to us to be in accordance with that prescribed by the Parochial Assessment Act (1), the basis of the [*561] assessment *being "the rent at which the same might reasonably be expected to let from year to year," subject to the enumerated deductions. It seems difficult to suggest any other principle for an assessment upon the reservoir and works than that which has been adopted. Say the appellants, "it ought only to be nominal because the forty-eight acres of land purchased and occupied by us are now covered with water and no longer produce trees, corn, or grass;" but surely the law must regard the purpose to which the land is applied. This land, used as it is, would, by admission, produce to individuals a profit which would justify the assessment. We are next told that the rateable value should not be estimated at more than 12*l.*, its former amount; but you cannot look to the land to be assessed as it was used at any former period, either with a view of increasing or diminishing the amount of the assessment. *Mr. Cowling* chiefly relied upon the objection that, if this rate were confirmed, the mill owners would be doubly assessed: but the objection would hold equally if the undertaking had been carried on by a Water Company; for the assessment in Kentmere would necessarily enhance the price to be paid for the additional supply of water, and still each mill owner would be liable to be assessed, in his own township, upon his mill according to its increased value from the additional supply of water. In neither case would there be a double assessment in the manner supposed; for, in fixing the assessment on the mill, regard must be had to the price paid for the additional supply of water; and, the undertaking being in the hands of Commissioners, who will reimburse themselves for the Kentmere assessment by a reservoir rate upon the mill owners, when the mill owners are assessed in their own townships the rate-[*562] able value of their mills must be estimated at an *amount *minus* the contribution to the Kentmere assessment, paid by each mill owner.

Order of Sessions quashed and rate confirmed (2).

(1) 6 & 7 Will. IV. c. 96, s. 1.

(2) See *Reg.* v. *Churchwardens and Overseers of Longwood* (17 Q. B. 871), *post.*

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1851. *Nov.* 15.

(17 Q. B. 574—588; S. C. 21 L. J. Q. B. 49; 16 Jur. 84.)

[574]

The plaintiff, tenant of a house for term of years, being possessed of shelves, stoves, ranges, ovens, boilers and other articles of household use, his own property but annexed to the freehold, requested the landlord to purchase them at the expiration of the term or let them remain for purchase by the incoming tenant, but to be taken away by plaintiff if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding: "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold till the entry of the new tenant, who came in under demise from the same landlord, but who declined to take them. Plaintiff then (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures; but the tenant refused permission; and plaintiff thereupon brought case for the hindrance, and trover, against the tenant:

Held that, if the landlord's letter to plaintiff amounted to a license to take away the articles, yet, not being under seal, it was no valid grant of such privilege as against a new lessee in possession of the premises and not party to the license.

Held also that trover did not lie for the above articles, unsevered from the freehold.

CASE. The first count stated that, whereas before the committing of the grievances &c. the plaintiff held a messuage and premises in Surrey as tenant thereof *to John Bowler for a term, [*575] viz. of 21 years from 29th September, 1829, which had before then expired, and that Bowler, being the owner of the said messuage &c., had, before the expiration of the said tenancy, to wit on the day and year aforesaid, for and in consideration of a sum &c., viz. 30*l.*, paid to him by plaintiff for the same, bargained, sold and transferred to plaintiff divers "personal chattels of and belonging to the said J. B., fixed and fastened to the said messuage and premises, to wit" &c.: then followed an enumeration of fixtures, among which were stoves, covings, blowers, shelves, sun-shades, finger-plates, bell pulls, cranks, wire and hooks, curtain laths, rods, blinds, racks, spring rollers, hat-pins, a bracket, ranges, ovens, boilers, cranes, closets, plate-rack, and dressers: "and the said chattels so fixed and fastened as aforesaid, being of the value" &c., "thereupon then became and were, and from thence hitherto have been and still are, the chattels and fixtures of the plaintiff:" And whereas, before the committing &c. and after plaintiff became such tenant as aforesaid, to wit on the day and year aforesaid, one Thomas Usborne, being possessed of divers other personal chattels, his property, fixed and fastened to the said messuage and premises, to wit chattels of the like number, quantity, quality, description and value as those

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hereinbefore mentioned, and being entitled to detach and remove the same from and off the said messuages and premises or to sell and transfer the same to the plaintiff, did, to wit on the day and year aforesaid, with the assent and privity of the said John Bowler, bargain, sell and transfer the same to the plaintiff, and thereupon the same then became and were and still are the chattels and fixtures of the plaintiff: And whereas, before the committing &c., [*576] *and during the continuance of the said tenancy, the plaintiff, being possessed of divers personal chattels, to wit chattels of the like number, &c., description, &c., as those hereinbefore first mentioned, had put up and fixed and fastened the same in, to and upon the said messuage and premises for the ornament of the said messuage &c. and for domestic purposes, and for his more convenient use and enjoyment of the said messuage &c., and the same were respectively so put up, fixed and fastened that the same could and might be detached and removed from and off and out of the said messuage &c., without causing or doing any material injury or damage to the said messuage &c., and the plaintiff, after he had so put up, fixed and fastened the said chattels, was of right entitled to detach and remove the same from and out of the said messuage &c. during the said tenancy; and the said chattels, so put up, fixed and fastened as aforesaid, afterwards, and during the said tenancy, continued to be and were used and enjoyed by the plaintiff for domestic purposes and for his more convenient use and enjoyment of the said messuage &c., and the same for and during all the time aforesaid were and still are the chattels and fixtures of the plaintiff: And whereas, whilst the plaintiff was such tenant, and before the expiration of the said term, and before the committing &c., to wit on 28th September, 1850, the said John Bowler gave and granted unto plaintiff leave and licence to keep and continue the said several chattels and fixtures so respectively put up, fixed and fastened as first and afterwards aforesaid in, to and upon the said messuage and premises after the expiration of the said tenancy, in order and for the purpose that he might sell and dispose [*577] of the same to the person who *should next after the expiration of the said tenancy become tenant to the said John Bowler of the said messuage &c., and to enter upon the said messuage &c., and detach and remove the said chattels and fixtures from the same in case such tenant would not purchase the same of the plaintiff: And whereas the plaintiff, before the committing &c., in pursuance of the said leave and license, and acting upon the same, did not, before or

at the expiration of his said tenancy, or at any time since, detach or remove the said chattels and fixtures from the said messuage and premises, and from thence until the committing of those grievances suffered and permitted to remain, and kept and continued, the said chattels and fixtures so fixed and fastened as aforesaid upon the said messuage and premises for the purpose aforesaid, and the said John Bowler never at any time revoked or countermanded the said leave and license: And whereas, before the committing &c., and after the said term and tenancy had expired, to wit on 29th November, 1850, the defendant became and was tenant to the said John Bowler of the said messuage and premises, and he was the next tenant to the said John Bowler of the said messuage and premises after the expiration of the plaintiff's said tenancy; and, for and during all the time aforesaid and hitherto, the said chattels and fixtures were and still are the chattels and fixtures of the plaintiff; and thereupon, defendant having notice of the premises, plaintiff afterwards, and within a reasonable time in that behalf, applied to and requested of defendant to purchase the said chattels and fixtures of the plaintiff, but defendant wholly and absolutely refused then or at any other time so to do: and thereupon afterwards, and within a reasonable and proper *time in that behalf, and at a seasonable and proper time of the day, to wit on 28th January, 1851, plaintiff requested of defendant, then being in the possession of the said messuage and premises, to suffer and permit plaintiff to enter into and upon the same for the purpose of his detaching and removing the said chattels and fixtures from and off the said messuage and premises, and plaintiff would have entered into and upon the said messuage &c. for that purpose, and would in a reasonable and proper time have detached and removed the said chattels and fixtures from and off the said messuage &c., had defendant suffered and permitted him so to do, but defendant then wholly and absolutely refused to suffer or permit plaintiff then or at any other time so to do, and then obstructed and hindered and prevented plaintiff from entering into and upon the said messuage and premises for the purpose aforesaid, and from detaching and removing the chattels and fixtures from and off the same, the outer door thereof being then open, and then claimed the right and title to use the said chattels and fixtures as his own for and during his said tenancy, and then and from thence hitherto hindered and prevented the plaintiff from having or using the same, and he himself used the same and converted and disposed thereof to his own use.

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The second count was in trover for "divers goods and chattels, to wit" &c.: nearly the same list of articles as that given in the first count, but without any averment of their being fixed or fastened &c.

Pleas: 1. Except as to the grievances in the second count mentioned, so far as they relate to the blowers, curtain laths, hat-pins, rods (and a few other articles) therein mentioned, Not guilty. Issue thereon.

[579] 2. To the 1st count: That John Bowler did not grant to plaintiff the said leave and license in that count mentioned, in manner and form &c. Conclusion to the country. Issue thereon.

3. To the second count, except as in the first plea excepted, Not possessed. Conclusion to the country. Issue thereon.

4. To the grievances in the second count mentioned, so far as they relate to the said blowers, &c. (the articles excepted in the first plea), payment into Court of 3*l.*; which the plaintiff accepted.

On the trial, before Alderson, B., at the last Surrey Assizes, the facts material to the present report appeared, substantially, as stated in the first count. It was proved that, when the plaintiff's term was about to expire, he requested, by letter dated August 27th, 1850, to know whether Bowler would purchase the fixtures belonging to him, and which were among the articles mentioned in the first count. It was assumed at the trial that these were things which might be removed during the term, but (in the absence of express stipulation) were not removeable afterwards.

The plaintiff's proposal was in terms as follows. After some notice of a demand by Bowler for dilapidations, he said: "The fixtures being mine, will you take them at a reasonable sum, deducting what may be allowed for dilapidations; or will you allow them to remain, subject to a future tenant taking them when you let the house? If you allow them to remain, and a future tenant refuse to take them, I would then take them away; thinking by their remaining the house would let better."

On 31st August Bowler's solicitor wrote in answer:

[*580] "At present there are two parties in treaty for a lease, *to commence at Michaelmas: and, if the premises be not repaired by that time, it is quite clear that manifest injury will be done to Mr. Bowler, who must of course stipulate with his new tenant that the premises be put into a proper state of repair. Mr. Bowler has no intention of purchasing your fixtures; but he has no objection to your leaving them on the premises and making the best terms you can with the incoming tenant."

In December, 1850, after defendant had entered, plaintiff requested defendant to inform him if he would purchase the fixtures, and, on his declining, claimed liberty to enter and remove them. Formal demands of the fixtures, and of access for the purpose of removing them, were served upon the defendant in December, 1850, and in January, 1851.

It was argued on behalf of the defendant that the license relied upon by the plaintiff was inoperative against the defendant, not being by deed: also that trover does not lie for fixtures. The learned Judge left the case to the jury, desiring them to say whether, supposing plaintiff entitled to the fixtures, his application to defendant for them was made in reasonable time. The jury were of opinion that it was not: and the learned Judge directed a nonsuit, giving leave to move to enter a verdict for the plaintiff for 9*l.* 10*s.*

Shee, Serjt., in this Term (November 5th), moved accordingly (before Lord Campbell, Ch. J. and Patteson, J.), and contended that neither of the objections taken at the trial was valid; and that the point put by ALDERSON, B., to the jury was not raised by the pleadings. A rule *nisi* was granted; but Lord CAMPBELL, Ch. J., said, as to the count in trover: Your case must rest upon the first count: as to trover, it appears to us clear that, until *severance, [*581] the fixtures were not chattels. But you may mention this point in argument.

Bramwell and *Lush* now showed cause:

Supposing that the letter of August 31st was a license in fact, it was void in law. It was a license to enter at a future time and sever something which would otherwise have been part of the freehold. *Wood* v. *Leadbitter* (1) is a direct authority for holding that such a license, not under seal, is invalid as to future acts; though it might have been alleged in defence of trespasses actually committed. Even if available against the landlord, it could not bind a party to whom he conveyed the premises: *Wallis* v. *Harrison* (2). Assuming such a license to be grantable by parol, it was revocable, and was, in effect, revoked in this case. Again, the first count alleges a license to enter and remove the chattels without limit as to time. But no such license was proved; nor is it supposable that the landlord would have given the plaintiff leave to do these

(1) 67 R. R. 831 (13 M. & W. 838). (2) 51 R. R. 715 (4 M. & W. 538).

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acts at any future time without restriction. Such a license would have debarred the landlord, indefinitely, from letting to any person who would not buy the fixtures. If it could be implied that a reasonable time was intended, it was proved, and the jury have found, that the application for these articles was not made within a reasonable time. But the meaning clearly was, that Bowler himself would not raise any objection to the plaintiff's removing them. It may be that an action would have lain against Bowler for the breach of that contract: but this is not such an action.

(PATTESON, J.: Do the issues here raise these questions?)

[*582] The declaration *states, in effect, that, at the time of the alleged grievances, the plaintiff had, by grant from Bowler, a license to do certain acts on the premises: the second plea is that Bowler did not grant to the plaintiff the said license in manner and form &c.: on that plea issue is joined; and it appears that the license actually claimed is to do certain acts upon the premises after they should be demised to a tenant. The position that such a prospective license could not be granted without deed sustains the issue on the part of the defendant, it appearing that no deed exists. The present case is stronger than that of *Wood* v. *Leadbitter* (1), because here an easement in land is claimed.

Secondly, the articles in question were admitted to be fixtures; and therefore trover does not lie for them; note (*r*) to *Greene* v. *Cole* (2), in the last edition of Saunders; where it is said: "The law remains unaltered, that until they" (fixtures) "are severed from the freehold, they are not goods and chattels at all, but parcel of the freehold; and as such are not recoverable in trover." *Mackintosh* v. *Trotter* (3), there cited, supports this proposition. That they are not severed, and must now remain part of the freehold, may be a fault of the landlord and a breach of contract for which an action might lie against him: but the articles are not the more recoverable as chattels. If a tenant for life had had the leave which was given to the now plaintiff, and died, a remainderman might have claimed these as part of the freehold. The sheriff could not have taken them under a *fi. fa.* against the present plaintiff.

[583] *Shee*, Serjt. and *Grady*, *contrà*:

In *Wood* v. *Leadbitter* (1) the claim was to a right over land; the

(1) 67 R. R. 831 (13 M. & W. 838).
(2) 2 Wms. Saund. 259 c. 6th ed.
(3) 3 M. & W. 184.

principle asserted in the judgment of the COURT was "that no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed" (1); and the doctrine was extended to interests less than an inheritance; but here nothing more is claimed than a mere permission. *Wallis* v. *Harrison* (2) also differs from this case: there the subject-matter was an interest in the soil, but the Dean and Chapter had only agreed to give it; there was no possession, but merely an executory license; and it was said that, to give this, a deed was necessary. In both these cases the doctrine as to license being irrevocable or not was confined to licenses conferring an interest. In the present case there is no license coupled with an interest.

(WIGHTMAN, J.: Do you argue that, if the owner of a house simply gave a license to come into it from time to time for a particular purpose, and then demised the house, the licensee might insist upon coming in for the same purpose afterwards?)

He might.

(WIGHTMAN, J.: Then you say that the lessee here is bound by the license.)

He is, if he takes from a person so bound. The tenant comes in to take away his own goods. He is not to lose them merely because the premises are demised.

(WIGHTMAN, J.: If the action will lie on that ground, you are entitled to recover independently of any license. Do you contend that the allegation of license is immaterial to your case?)

The argument may go that length. But at all events no allegation is made here of a license granting an interest; nor does the *case [*584] require it.

(COLERIDGE, J.: You must contend that you had a license to enter for the purpose of taking away the goods on any day during eight or nine weeks from the time when the defendant became tenant.)

Lord KENYON, in *Penton* v. *Robart* (3), at Nisi Prius, intimated an opinion that, "where the tenant has by law a right to carry away any erections, or other things, on the premises which he has

(1) 67 R. R. 835 (13 M. & W. 842).
(2) 51 R. R. 715 (4 M. & W. 538).
(3) 6 R. R. 376 (4 Esp. N. P. C. 33; *S. C.* in Banc, 2 East, 88).

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quitted," "he has a right to come on the premises, for the purpose of taking them away:" but the case did not require a decision on that point. It is observed in Mr. Smith's note on *Elwes* v. *Maw* (1) in 2 Smith's Lead. Ca. 118 (where the several authorities are compared) that the landlord's right to fixtures after the term seems to depend upon "a presumption of law that the tenant, quitting the premises at the expiration of the term and leaving the fixtures behind him, intended to bestow them on his landlord, to whom they become a gift in law." The license by the landlord rebuts that presumption, and may be considered as the result of a special agreement made between him and the tenant for that purpose.

(WIGHTMAN, J.: If you disregard the license, how do you distinguish this case from *Weeton* v. *Woodcock?* (2).)

The direct ruling there is, that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." That period was deemed there to have expired; but the circumstances, in other respects, were not like those of the present case.

[585] That trover will lie for fixtures in the common acceptation of the word, if the tenant has a right to them, is a point which was scarcely disputed at the trial. *Davis* v. *Jones* (3) and *Sheen* v. *Rickie* (4) are direct authorities for it; and the propriety of such an action may be inferred from *Penton* v. *Robart* (5). In *Gregg* v. *Wells* (6) fixtures (the fittings of a public-house) were assumed on both sides to be the subject of an action of trover. And in *Hallen* v. *Runder* (7) *indebitatus assumpsit* was held to lie for "personal chattels which have been annexed to the freehold, but which are removeable at the will of the person who has annexed them." The articles in question there were, as here, fixtures of a dwelling-house.

PATTESON, J.:

This rule must be discharged. The plaintiff relies upon a leave and license granted by the landlord Bowler, as stated in the first count. (His Lordship then read the material parts of the count.)

(1) 6 R. R. 523 (3 East, 38).
(2) 56 R. R. 606 (7 M. & W. 14).
(3) 20 R. R. 396 (2 B. & Ald. 165).
(4) 5 M. & W. 175.
(5) 6 R. R. 376 (2 East, 88).
(6) 50 R. R. 347 (10 Ad. & El. 90).
(7) 40 R. R. 551 (1 Cr. M. & R. 266; *S. C.* 3 Tyr. 959).

This license is supposed to have been available at the time of the alleged grievance, by relation to the time when the document was written. But the effect of that document as a license to enter is very slight. It amounts to no more than saying: "Make what bargain you can with the incoming tenant;" not, "if you cannot effect a bargain with him you may still enter." Until the expiration of the plaintiff's tenancy the landlord had no right of possession: the actual possession was in the plaintiff: the license therefore, if any, was prospective; and the effect which the plaintiff *would give to it is, to bind the incoming tenant after the [*586] plaintiff has quitted; not on the ground of contract by that tenant, but as a matter of duty. The declaration so puts it. Such a license, having such a prospective operation, is something like a grant of interest in the land: but at all events it is a grant of authority to enter and remove something at a future time, which might have been valid if executed, or might perhaps have been a ground of action by the plaintiff against his landlord for not making such a bargain with the incoming tenant as would enable the plaintiff to enter and take the fixtures: but the elaborate judgment of the Court of Exchequer in *Wood* v. *Leadbitter* (1) shows that, not being granted by deed, it cannot, against the defendant, sustain the first count of this declaration. As to the question whether or not trover lies, cases certainly run very near the wind: but the general principle is, that, where the articles are of such a kind as to become fixed to the freehold, the tenant, if they are tenant's fixtures, may remove them during the term, or during such time as he may hold possession after the term in the capacity of a tenant. That is the only right which exists on this head, between him and the landlord. If the articles had been so disannexed, they might have been chattels for which trover would have lain; or if they had never been annexed: but I do not find it suggested here that the things in question were not annexed to the freehold, or had been disannexed. The question of their being a gift to the landlord is not raised here: this is not the ground on which the plaintiff's claim *is disputed, but the nature of the [*587] things themselves, from which it results that (as my brother Williams has stated in note (*r*) to *Greene* v. *Cole* (2)), until they are severed from the freehold, they do not become goods and chattels, and trover does not lie to recover them. I think, therefore, that neither count of this declaration is supported.

(1) 67 R. R. 831 (13 M. & W. 838). (2) 2 Wms. Saund. 259 c, 6th ed.

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COLERIDGE, J.:

I am of the same opinion. Reading the letter of the plaintiff, and Bowler's answer of August 31st, I should say that Bowler granted no right which was to have effect after the tenancy was at an end. He does not profess by the letter in question to tie up either his own hands or his future tenant's. As a license, assuming this to be one, nothing could be effectual for the purpose contemplated here which did not bind the land in the hands of a person not privy to the grant. Now Bowler, in this case, lets the land to the defendant without any reservation; and the plaintiff, notwithstanding, requires liberty to go in on any day during nine weeks and pull down the fixtures. *Wood* v. *Leadbitter* (1) shows that, to carry such a right as that, there must be an instrument under seal. It is answered that in the present case that was not necessary, the leave being only a matter of special agreement between Bowler and the plaintiff. But that leaves Bowler's rights over the land unfettered: it might give the plaintiff a cause of action against Bowler for breach of his engagement, but not against the tenant to whom Bowler, in the exercise of his right, demised.

[588] WIGHTMAN, J.:

My brother *Shee*, when he was asked to distinguish the present case from *Weeton* v. *Woodcock* (2), admitted that that case established a principle applicable to this, but relied upon a difference in the facts. The question, then, is, whether the permission, such as it was here proved to be, gave the plaintiff a right to enter and take the fixtures after the defendant was in possession of the premises. The license was merely by parol: but it is, according to the plaintiff, to take effect, not during his tenancy, but against an incoming tenant who is no party to the grant. The plaintiff claims a right of entry during a reasonable time, without qualification, for the purpose of removing the fixtures. But to give such a power, and to constitute such an easement, there must be a grant by deed. This is laid down both in *Wood* v. *Leadbitter* (1) and in a case still more in point, *Wallis* v. *Harrison* (3). The right assumed to be created by this grant would be a right paramount to that vested in the new tenant by the subsequent demise. As to the second count, I think trover was not maintainable for these articles, which are

(1) 67 R. R. 831 (13 M. & W. 838).
(2) 56 R. R. 606 (7 M. & W. 14).
(3) 51 R. R. 715 (4 M. & W. 538).

described as fixtures, a term *primâ facie* implying that they are fixed to the freehold, though they might, under some circumstances, become disannexed (1).

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Rule discharged.

DOE D. LANSDELL *v.* GOWER (2).

1851. *Nov.* 4, 15.

(17 Q. B. 589—600; S. C. 21 L. J. Q. B. 57; 16 Jur. 100.)

[589]

Defendant in ejectment was let into possession of a cottage, parochial property, by the parish officers of P., whose successors were lessors of the plaintiff. An entry was on that occasion made in the vestry-book, as follows:

"We, the churchwardens and overseers of P., do hereby agree to let to J. B., of" &c., "the newly erected cottage" &c., "situate" &c., "at the rent of 1*s.* 6*d.* per week: and the said J. B. doth hereby agree to quit and give up the said cottage into the hands of the parish officers at any time on one month's notice from the churchwardens and overseers for the time being, or one of them, or by their order:" "the rent, as above stated, to commence from the date hereof. Witness" &c. Signed by defendant and an overseer.

Defendant occupied the premises for twenty years, paying no rent. He was then served with a notice to quit, signed by an overseer but by no churchwarden; but he refused to give up the property, claiming it as his own. He continued to occupy for five years longer, and then sold the premises. There was evidence that his occupation, and the circumstances of it, were known to the successive parish officers during all the above period. Held:

That, if the parish officers, lessors of the plaintiff, were entitled to maintain the action, notice to quit was unnecessary, the defendant having disclaimed.

That the document above described was for a sufficiently determinate period to constitute a lease.

That such a lease, being for less than three years, might have been granted by the parish officers without writing, if all concurred.

But that the document in question did not appear to be a grant by all the parish officers, as the overseer did not profess to sign for all, nor did it appear, by the document itself or by extrinsic evidence, that all the officers concurred: Consequently, that there was no valid lease under the powers given to parish officers by the Poor Relief Act, 1819 (59 Geo. III. c. 12), ss. 13, 17:

And, therefore, that the defendant held without such lease in writing as is contemplated by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 8, and the right of the lessors of the plaintiff to bring ejectment was barred.

EJECTMENT for messuages and land in the parish of Pembury in Kent. Demise, May 17th, 1851, by Stephen Lansdell and Henry Jarman the churchwardens, and Evans Williams Morris and James Baldwin overseers of the poor, of the said parish. Further demises: By the same parties, mentioned by name only without

(1) No fourth Judge was in Court.

(2) See Sugden, New Laws of Real Property, 2nd ed. pp. 60, 61.—A. C.

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any addition of office: By Morris and Baldwin, overseers: By the guardians of the poor of the union of Tunbridge, Kent: By William Hartridge and Thomas Austen, churchwardens, and Benjamin Pawley an overseer of the poor, of Pembury: By the three last mentioned parties, without addition of office: By Benjamin Pawley and George Budgen: By Benjamin Pawley: And other demises by

[*590] churchwardens and overseers of Pembury, *with and without addition, which it is unnecessary to set forth.

On the trial, before Jervis, Ch. J., at the last Maidstone Summer Assizes, it appeared that the premises in question had lately been purchased by the defendant of one Joseph Boghurst. In 1823, Boghurst had been allowed by the officers of Pembury to take possession of a piece of land situate in the parish, and of a cottage, which they built upon the land for him. On his taking possession, he signed the following entry in a book belonging to the churchwardens and overseers of Pembury.

"Memorandum, Vestry room, Feb. 27th, 1824.

"We, the churchwardens and overseers of the poor of the parish of Pembury in the county of Kent, do hereby agree to let to Joseph Boghurst, of the said parish, the newly erected cottage and premises, situate at Henard's Green in the said parish, at the rent of 1*s.* 6*d.* per week: And the said Joseph Boghurst doth hereby agree to quit and give up the said cottage &c. into the hands of the parish officers of the said parish at any time on one month's notice being given to that effect from the churchwardens and overseers for the time being, or one of them, or by their order: And the said Joseph Boghurst doth hereby further agree not to take in any other person as inmate or lodger, nor suffer any other person whatsoever to occupy or reside on the said premises but himself, his wife and children, without the leave of the parish officers specially granted for that purpose: the rent, as above stated, to commence from the date hereof.

"Witness our hands this 27th day of February, 1824.

"(Signed) JOSEPH BOGHURST, my + mark.

"BENJN. PAWLEY, overseer.

"GEO. BUDGEN, assistant overseer.

"WILLIAM PAWLEY, witness."

[591] There were two churchwardens (Hartridge and Austen), an overseer and an assistant overseer, when this document was signed. Boghurst was several times afterwards relieved by the parish

officers as a pauper, and was permitted to occupy without paying or being asked for rent. Repairs were done to the premises in 1832 or 1833 by the parish. In 1844 Boghurst was served with a notice to quit, signed, not by all the parish officers, but only by an overseer and an assistant overseer. He refused to give up possession, alleging that the property was his own and the parish had nothing to do with it; and he continued to hold the premises thenceforward till, in 1850, he sold them to the now defendant. During this latter part of his occupation he was rated for them to the poor.

Shee, Serjt., for the defendant, objected: That there was no lease proved, for that the memorandum of 1824 was not for any determinate period, and the tenancy created by it, if any, was a tenancy at will, in which case the twenty years' limitation under stat. 3 & 4 Will. IV. c. 27, must, by sect. 7, run from the expiration of the first year, there being no evidence of determination of the will within twenty years before action brought; or else the tenancy was from month to month, or at most from year to year, and then the right of entry must, by sect. 8, be deemed to have accrued at the end of the first month or first year, for that there was no written lease: That, if the memorandum was in form a lease, it was invalid, because, the property being parochial, the churchwardens and overseers should have demised according to stat. 59 Geo. III. c. 12, sects. 13, 17, and for some given period, and both sets of officers should have signed the instrument: And that the notice to quit was invalid, *not being signed, according to the last mentioned [*592] Act, sect. 24, by the churchwardens and overseers or the major part of them. The LORD CHIEF JUSTICE observed, on this point, that the notice might be unnecessary, there having been a disclaimer. Leave was given to move for a nonsuit on all the points; and a verdict was found for the plaintiff.

Shee, Serjt., in this Term (November 4th), moved accordingly: He cited, as to the term created by the instrument in question, *Kemp* v. *Derrett* (1): he relied upon the above clauses of stat. 3 & 4 Will. IV. c. 27, and distinguished this case from *Doe* d. *Davy* v. *Oxenham* (2) (cited at the trial): And, as to the requisites of a lease by parish officers, he cited *Phillips* v. *Pearce* (3), *Ward* v. *Clarke* (4)

(1) 14 R. R. 828 (3 Camp. 509).

(2) 56 R. R. 662 (7 M. & W. 131). *Bramwell*, in showing cause, said that this case was cited only to show that no inference arose from the mere non-payment of rent.

(3) 29 R. R. 284 (5 B. & C. 433).

(4) 67 R. R. 472 (12 M. & W. 747).

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and *Doe* d. *Higgs* v. *Terry* (1). He also objected, as on the trial, to the notice to quit.

(LORD CAMPBELL, Ch. J.: Was any necessary? (2). Do not the facts amount to a disclaimer?)

Shee, Serjt. admitted that JERVIS, Ch. J. had suggested the same answer. A rule *nisi* was granted on the other points; no rule on this last.

Bramwell and *Willes* now showed cause:

The parish officers are entitled to recover, under the general clauses, 2 and 5, of stat. 3 & 4 Will. IV. c. 27, unless the case falls within sect. 8. That clause enacts that, when any person shall be in possession of any land "as tenant from year to year or other [*593] period, without any lease in *writing, the right of the person entitled subject thereto" "to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." The question, therefore, is, whether the writing of February 27th, 1824, was a binding lease or not. In its form it is clearly a demise of some interest. It creates a tenancy from month to month; the continuance is monthly, though the rent is payable weekly. At least there was a tenancy from week to week; and that satisfies the words "from year to year or other period." There was an interest for five weeks at all events. The authorities show that "from year to year" includes a holding for a less period. A writ of waste, where the letting was for half or a quarter of a year, ran "*quod tenet ad terminum annorum:*" Littleton, B. 1, s. 67. *Kemp* v. *Derrett* (3) is an authority against the defendant: there an agreement that the tenant was "always to be subject to quit at three months' notice" was deemed to give a holding "from three months to three months." No other construction is required here. "Tenant at will is, when a man lets lands to another without limiting any certain or determinate estate:" Com. Dig. Estates (H 1): that is clearly not the present case. It is, however, contended on the other side that no lease existed because there was not a document formally executed

(1) 13 R. R. 336 (4 Ad. & El. 274). R. R. 323 (8 B. & C. 4).
(2) See *Wildbor* v. *Rainforth*, 32 (3) 14 R. R. 828 (3 Camp. 510).

by the parish officers under the powers given by stat. 59 Geo. III. c. 12. But, to take the case out of the operation of stat. 3 & 4 Will. IV. c. 27, s. 8, nothing more was requisite than "a lease in writing." Such a lease as would, at the time of its execution, have satisfied the *Statute of Frauds was sufficient. The memorandum [*594] in question has not the form of a deed, and does not profess to be a regular document executed by the parochial body. It evidences the transaction between lessors and lessee, and binds the lessee at least. The demise was not required by the Statute of Frauds to be in writing and signed by the grantors, being for less than three years: it would have been free from objection under that statute, if agreed upon by word of mouth; and there was no necessity that all the parish officers should be present, provided all concurred. The memorandum, written in the book which contains the entries of their transactions, was some proof of their concurrence; and it was followed by actual possession, which, according to the evidence, must have been known to them and their successors. If any signature was necessary independently of the Statute of Frauds, the signature of the tenant to the words beginning "We the churchwardens and overseers" &c. was sufficient, and was binding upon him. There is, therefore, a sufficient lease in writing to meet the intention of stat. 3 & 4 Will. IV. c. 27, s. 8, though it be not well executed according to stat. 59 Geo. III. c. 12.

But, even under stat. 59 Geo. III. c. 12, it was not necessary that the instrument should be executed by all the parish officers. [They referred to *Smith* v. *Adkins* (1), *Gouldsworth* v. *Knights* (2), *Phillips* v. *Pearce* (3), and *Doe* d. *Higgs* v. *Terry* (4).] Here the formalities [596] of a deed do not come in question; all that is wanted is a "lease in writing;" and the lease here, not being for more than three years, did not require to be signed by the grantors according to sect. 1 of the Statute of Frauds, being within the exception of sect. 2. Again, if the signature of the lessors was necessary, here is a signature by one overseer; if he signed for all the officers it is sufficient: and there was evidence, on the face of the document and from the circumstances of the case, that he did.

(PATTESON, J.: In the case of a partnership has it ever been assumed that the signature of one partner, not professing to sign for himself and the firm, bound them?

(1) 58 R. R. 735 (8 M. & W. 362).
(2) 63 R. R. 619 (11 M. & W. 337).
(3) 29 R. R. 284 (5 B. & C. 433).
(4) 43 R. R. 336 (4 Ad. & El. 274).

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Coleridge, J.: Suppose such a document as this had been executed under seal, what would have been its effect?)

It would appear by *Cooch* v. *Goodman* (1) that a party executing might have been bound by it.

(Wightman, J.: Though binding, would it be a "lease in writing?"

Coleridge, J.: Although it might be evidence of the terms of demise.)

When a plaintiff produces a counterpart, it is no objection that the only signature appearing is that of the defendant.

(Wightman, J.: There it would be taken that a part was executed on each side: but here the whole document is before us.)

Willes mentioned *Wheatley* v. *Boyd* (2), moved this Term in the Court of Exchequer.

Shee, Serjt. (with whom was *Horn*), *contrà*:

The instrument signed by one overseer was no demise by the parish officers.

(Coleridge, J.: Suppose the others had expressly authorized him.)

[*597] There was no evidence *of that. And the statute 59 Geo. III. c. 12, would still not have been complied with. *Phillips* v. *Pearce* (3) decides this point. The object of the statute was to make the parish officers a *quasi* corporation; and it is evident from sects. 17 and 24 that all were intended to act, and in so doing to declare themselves as the acting parties. No attempt was made at the trial to meet this objection by showing that one parish officer was authorized by the rest: the point mainly relied upon for the plaintiff was that no lease under the statute of 59 Geo. III. was necessary.

(Wightman, J.: Suppose the lessors had not been parish officers, but other persons having a joint authority.)

The demise would have not been good. The point now contended

(1) 2 Q. B. 580, 599, 600.
(2) 7 Ex. 20.
(3) 29 R. R. 284 (5 B. & C. 433).

for was assumed in *Wheatley* v. *Boyd* (1), which is an authority for the defendant. *Cooch* v. *Goodman* (2) was under the consideration of the Court of Exchequer in that case, and in *Pitman* v. *Woodbury* (3).

Shee, Serjt. read the comments of PARKE, B., in the latter case (4), upon *Cooch* v. *Goodman* (2).

PATTESON, J. said, in *Doe* d. *Marlow* v. *Wiggins* (5): "*Cooch* v. *Goodman* (2) was a very peculiar case. All that the COURT decided there was, that the action might lie though the deed was not executed by the covenantees: it was not held that an interest passed by the deed, or that it amounted to a lease. And the case went off upon another point." Here it is requisite to the plaintiff's case that there should have been a "lease in writing:" and the authorities show that there was none. And, further, a lease must be for "a determinate time:" 4 Bac. Abr. 816, tit. Leases and Terms for Years (K), *7th ed.

[*598]

(WIGHTMAN, J.: A time is fixed here by implication.)

It does not appear whether the holding was to be weekly or monthly. (He was then stopped by the COURT.)

PATTESON, J. (6):

The whole question is whether there was in this case a lease in writing within stat. 3 & 4 Will. IV. c. 27, s. 8. It is contended for the plaintiff that, under stat. 59 Geo. III. c. 12, it was not essential that there should be a written lease for a term like this: and that is true; there might be a tenancy of some sort created without writing. But, if there be no actual lease, the twenty years limitation under stat. 3 & 4 Will. IV. c. 27, has taken effect long since. So that we still come to the question whether or not there was a lease in writing. That there was no lease for a determinate period is not the strong point for the defendant. On the words of the memorandum an implication might be raised that the holding was to be from month to month. The real question is, whether the execution of this instrument by one parish officer is sufficient for the present purpose. It is not the signature of a document,

(1) 7 Ex. 20.
(2) 2 Q. B. 580.
(3) 77 R. R. 537 (3 Ex. 4).
(4) 77 R. R. 541—543 (3 Ex. 11—13).
(5) 4 Q. B. 367, 376.
(6) Lord Campbell, Ch. J., was at the Criminal Court of Appeal, Erle, J. at Nisi Prius.

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generally, but of a lease; of something which is to pass an interest. It was scarcely, I think, contended that, if this had been a demise under seal on behalf of several lessors, the execution of one only would have been enough, unless he had had a power of attorney. But it was argued that one parish officer might execute such an instrument as this, by the mere assent of the others. And, if he had in terms professed to execute for himself and the others, [*599] that might have been so held: at least *it might have lain on the opposite party to show that there was no authority: but the execution was not in that form. Then it is suggested that the document itself professes to be the lease of all, and may be deemed so if they in fact assented. But, admitting that position (though I do not see that it is correct), evidence of an actual assent should have been given: and the learned Judge's notes do not show any such evidence; nor does any appear on the face of the instrument. If the lessors of the plaintiff can give such proof hereafter, they may try the case again: at present the rule will be absolute for a nonsuit.

COLERIDGE, J.:

The lessors of the plaintiff are barred by the limitation of stat. 3 & 4 Will. IV. c. 27, s. 8, unless there was a lease in writing: that is, not merely an instrument which would be evidence of the conditions of holding, but one passing an interest. Here, the entry in the parish book is signed by one officer only, not professing to subscribe for the rest. If that document had come in question the day after it was executed, it would not have been held a sufficient lease under the Act 59 Geo. III. c. 12, which makes the church-wardens and overseers a statutory corporation, the case appearing in proof as it does now. If, indeed, the additional evidence had been given, that the party signing had taken the instructions of his colleagues, and signed under those instructions, I do not say whether or not that would have been sufficient. But it lay upon the lessors of the plaintiff to show that the officer signing did so as agent for the rest. Therefore there must be a nonsuit, which will give the opportunity of trying this question again.

[600] WIGHTMAN, J.:

The case reduces itself to one point, whether or not there was a lease in writing. The document produced in evidence might have been such as to bind the party signing as tenant: but that does

not meet the object of stat. 3 & 4 Will. IV. c. 27, s. 8, which requires an instrument in writing that may operate as a lease. Therefore the case, as it stands, is not taken out of the limitation.

Rule absolute for a nonsuit.

REG. *v.* THE INHABITANTS OF ST. GILES WITHOUT CRIPPLEGATE (1).

1851. *Nov.* 19, 20.

[636]

(17 Q. B. 636—651; S. C. 21 L. J. M. C. 26; 15 Jur. 1154.)

A female pauper, born in parish A., the legitimate daughter of Irish parents, neither of whom had gained a settlement in England, left their house while under the age of 21, and resided three years, unmarried, in parish B., with a man, by whom she had a child. While so residing, she visited her parents several times, for a fortnight or three weeks at a time. After the death of the man with whom she had been residing, she and her illegitimate child, still residing in parish B., were relieved by that parish. While she was still under 21, parish B. obtained an order to remove her and her child from B. to A. From the time when the pauper left her parents till the making of the order, they resided, not in A. or B., but in a third parish in England:

Held, on appeal against an order of Sessions quashing the order of removal, that the pauper and her parents were not removeable to Ireland under the Poor Removal Act, 1845 (8 & 9 Vict. c. 117), s. 2, and that the order of removal to A. was rightly made.

THE after-mentioned order was quashed on appeal, subject to the opinion of this Court upon a case, the material parts of which were as follows.

This was an appeal against an order of justices, made 1st February, 1851, for the removal of Margaret Henry, single woman, and her bastard child, aged seven months, *from the parish of St. Giles [*637] without Cripplegate, in the city of London, to the parish of St. James, Westminster, in Middlesex, as the place of their last legal settlement.

The grounds of removal, after alleging chargeability, stated that Margaret Henry was the daughter of Irish parents, who had gained no settlement in England: that she was born on 9th March, 1830, in the appellant parish, and had done no act to gain a settlement: and that her infant bastard daughter was born in June, 1850.

The first ground of appeal traversed the fact of Margaret Henry being born as alleged in the appellant parish. The other grounds were as follows.

That, supposing the fact of Margaret Henry's birth in St. James's

(1) Cited, *Poor Law Commissioners of Ireland* v. *Liverpool Vestry* (1869) L. R. 5 Q. B. 79, 86, 39 L. J. M. C. 25. —A. C.

REG. v. ST. GILES WITHOUT CRIPPLEGATE.

to be proved, the said Margaret Henry, at the times when she became chargeable, and when the order of removal was granted, was under the age of 21 years, and an unemancipated child: and that, she being the lawful daughter of Mark Henry, then residing at No. 31, Cock Lane, Smithfield, in Middlesex, the said Mark Henry was legally bound to maintain her; and, in the event of his inability so to do, the maintenance and relief of the said Margaret Henry and her said bastard child could not be cast on St. James, Westminster, by reason of the birth of the said Margaret Henry therein. And that, the said Margaret Henry being the daughter of Irish parents, who, as well as herself, had done no act to gain a settlement in England, the whole family should have been removed, if they were really chargeable, according to the statute in that case &c., to Ireland, to which country they legally belonged.

On the hearing of the appeal, it was agreed on both sides that
[*638] Margaret Henry was the legitimate daughter *of Mark Henry, an Irishman, and of his wife, an Irishwoman; that neither Mark Henry nor his wife had gained a settlement in England: that Margaret Henry was born, as alleged, in the appellant parish, on 9th March, 1830; and that the bastard child of Margaret Henry was only seven months old.

The following facts appeared from the evidence of the pauper, Margaret Henry. Her father, Mark Henry, had resided in the neighbourhood of his present domicile, No. 31, Cock Lane, Smithfield, in the parish of St. Sepulchre, in the county of Middlesex, from the time when she was a child, and had worked as a coppersmith, and maintained himself, his wife and children, by his labour, up to the making of the order of removal. Margaret Henry had lived with her father in the above mentioned house, as a member of his family, for many years, until she left his house without his consent, about four years before the date of the order, and went to live in the parish of St. Giles, Cripplegate, with a labouring man, by whom she had a family of children, and who was the father of the child named with her in the order. She lived with him as his wife, but was never married to him; and he, during his life, supported her by his labour. After his death, which took place about eleven months before she became chargeable to the respondent parish, she still lived in lodgings, hired and paid for by herself, in the respondent parish, supporting herself by selling fruit. During these four years she on two or three occasions, when she had a quarrel with the man she cohabited with,

went home to her parents for a fortnight or three weeks at a time, and, after this visit, returned to live with the same man. While she was living in lodgings, after the death of the man with whom she had *so cohabited, her mother at several times gave her victuals; but she never slept at her parents' home from the time of the man's death. Being, however, unable to support herself, she, without the knowledge or consent of her parents, and one month before she attained the age of 21, applied for relief to the respondent parish; whereupon she was, together with her bastard child, taken into the workhouse, and therein maintained at the charge of the respondent parish of St. Giles, until the hearing of this appeal, by which time she had attained the age of 21; but at the time of making the original order she had not attained that age.

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The question for the opinion of this Court was: Whether, upon the above recited grounds of removal and the above mentioned facts, the respondent parish was entitled to remove the pauper to the appellant parish, as the place of her legal settlement. If the Court should be of opinion that the respondents were so entitled, the order of Sessions was to be quashed, and the order of removal confirmed: if of the contrary opinion, the order of Sessions to be confirmed.

Ballantine, in support of the order of Sessions:

Stat. 8 & 9 Vict. c. 117, s. 2, enacts that, if any person born in (among other countries and places) Ireland, and not settled in England, become chargeable to any parish in England by reason of relief given to himself or to his wife, or to any legitimate or bastard child, such person, his wife, and any child so chargeable, shall be liable to be removed to the country of such person's birth. Here the pauper's father, Mark Henry, is a native of Ireland, and is not settled in England; and he has become chargeable by reason of relief given to *the pauper, Margaret Henry, who, at the time of the order of removal, was an unemancipated child. Her leaving the house of her father, before the age of 21, is not sufficient to render her emancipated: and the Sessions have, in effect, so decided, by quashing the order of removal. She and her child are, therefore, together with her father and mother, removeable to Ireland. It will be contended that she was not unemancipated, inasmuch as she could not be said to be residing in her father's house, and was maintained by another person. But it is clear that

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she was not emancipated; and the law recognises no intermediate status between those two. *Rex* v. *Uckfield* (1) answers the objection suggested. The facts of the present case show an *animus revertendi* on the part of the daughter; and in *Reg.* v. *All Saints, Derby* (2), it was evidently the opinion of the COURT that the separation from the parents must be permanent, to render the child emancipated and removeable to its birth settlement. It will be argued that to hold all the family removeable because one has become chargeable is giving a very stringent interpretation to the Act. But that interpretation has always been given, not only to the present Act, but to stat. 59 Geo. III. c. 12, s. 33, and stat. 3 & 4 Will. IV. c. 40, s. 2 (both now repealed (3)), each of which contained a provision of a similar character: *Rex* v. *Leeds* (4), *Rex* v. *Mile End, Old Town* (5). On the other side, *Rex* v. *Great Clacton* (6) [*641] will be relied upon: but there the mother, *though born in Ireland, had acquired a settlement in England by a second marriage.

(PATTESON, J.: Does stat. 9 & 10 Vict. c. 66, affect the question? May not the father here be irremoveable by reason of five years uninterrupted residence?)

The point was not raised upon the appeal. And, if the father is chargeable by means of his family, within stat. 8 & 9 Vict. c. 117, s. 2, the consequence there pointed out must follow: the Act is not controuled by stat. 9 & 10 Vict. c. 66.

(LORD CAMPBELL, Ch. J.: You are contending against the removeability of the daughter to the place of her birth. How are you interested in arguing that the father is removeable from the parish in which he is residing?

PATTESON, J.: You must take stat. 8 & 9 Vict. c. 117, as incorporated, by sect. 7, with the other Poor Law Acts.)

No interpretation of the Acts can make the pauper, in this case, removeable to the place of her birth settlement. A pauper having no other place to which he can be removed goes to his birth settlement: if his father and mother have a settlement he goes to that:

(1) 5 M. & S. 214.
(2) 80 R. R. 246 (14 Q. B. 207).
(3) The first by stat. 3 & 4 Will. IV. c. 40, s. 1, the latter by stat. 8 & 9 Vict. c. 117, s. 1.
(4) 23 R. R. 367 (4 B. & Ald. 498).
(5) 4 Ad. & El. 196.
(6) 3 B. & Ald. 410.

if they have none, but are natives of Ireland, and he is part of their family, he must be removed with them to Ireland. Here, the pauper being unemancipated, the father is chargeable, through her, and must be removed; an Englishman would be removeable to a parish in England; a native of Ireland must be removed thither. The whole question, therefore, turns upon the emancipation.

(COLERIDGE, J.: You must contend here for two steps: first, sending the pauper to her parents, and then making them chargeable to the removing parish, and so removeable to Ireland.)

The result is still obtained; and the statute must take effect.

(COLERIDGE, J.: Can the parents be chargeable where they are not resident? *You remove the pauper from St. Giles's because she is chargeable to St. Giles's. The parents reside in another parish. Can you insist that they shall be removed to Ireland because the daughter is chargeable, not to their parish, but to St. Giles's? Could parish A. remove persons from parish B. to Ireland?) [*642]

While unemancipated, the pauper virtually forms part of the family in parish B.

(COLERIDGE, J.: You make the father chargeable to two parishes; where she is chargeable, and where he resides.

LORD CAMPBELL, Ch. J.: You undertake a great difficulty if you contend that, by her becoming chargeable, the father becomes resident and chargeable where she is.)

Having the intention to return, she is virtually domiciled where he is.

(LORD CAMPBELL, Ch. J.: It is in vain to argue that the father was chargeable where he resided.)

It may reasonably be suggested that, she being unemancipated and chargeable, it is as if the father went to the parish where she is, and resided there.

(COLERIDGE, J.: Is there any authority for saying that a parish

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relieving the daughter could remove the father from another parish ?

PATTESON, J.: Could a London parish get an order to remove a man from a parish in Cumberland ?)

If there were a constructive chargeability as here suggested, the distance would make no difference in principle. The statute 8 & 9 Vict. c. 117, is evaded unless interpreted as the appellants suggest. There may be hardship in any construction.

(WIGHTMAN, J.: Suppose another unemancipated daughter had gone into another parish.

LORD CAMPBELL, Ch. J.: The father might be chargeable to as many parishes as he had unemancipated children living in.

PATTESON, J.: The parish where the daughter is might remove him from that; but they cannot get him there.)

[*643] The difficulties under this statute were *much considered by the COURT in *Reg.* v. *All Saints, Derby* (1), and several observations incidentally made by the learned Judges are applicable here.

(COLERIDGE, J.: The material question there was, whether or not there had really been a desertion.)

An apparent difficulty arises here because the daughter had reached so advanced an age as seventeen or eighteen before she left her father; but the principle involved is the same as if she had left him at the age of four.

Pashley and *F. Russell, contrà*, were not called upon.

LORD CAMPBELL, Ch. J.:

I am of opinion that the order of Sessions must be quashed. The pauper was born in St. James's, and became chargeable to St. Giles's, Cripplegate. *Primâ facie*, she was rightly removed to St. James's; and there she ought to be maintained, unless St. James's can show some other place to which she should be removed. Now she herself has no settlement but that of her birth; and her father has none. All, then, that St. James's can allege is that she ought to be sent to Ireland. But that is not so, because

(1) 80 R. R. 246 (14 Q. B. 207).

there are no means of sending her father. He never became chargeable to St. Giles's. There is no proof that he ever entered the parish. Therefore there are no means of removing him: and, consequently, as no parish except St. James's can be shown to which this pauper can go, it is to that parish she must be removed.

PATTESON, J.:

If the original order be quashed, the pauper must go back to St. Giles's, Cripplegate. That *parish cannot remove her to [*644] St. Sepulchre: there is no such thing as removing a pauper to her parents. All, then, that can be said is, that the father is chargeable to St. Giles's, and must be removed to Ireland from that parish, though he is not within it. But that cannot be maintained. There is, therefore, no place but that of the birth settlement to which the pauper can be removed.

COLERIDGE, J.:

A pauper is removeable to Ireland under stat. 8 & 9 Vict. c. 117, only if the condition precedent be fulfilled, that such person shall become chargeable to any parish in England by reason of relief given to himself, or his wife or child. It is true the clause does not in terms require that such person shall be resident in the parish; but this Act is appended to the other statutes which form the general law of settlement, and carries with it the understood condition that a person to be removed from a parish must be chargeable to that parish, being within it at the time.

WIGHTMAN, J.:

Mr. Ballantine is obliged to assume that the father in this case is chargeable to St. Giles's parish, which he never entered. But I think he is not so chargeable within the meaning of the statute, and that he, and therefore his daughter, is not removeable to Ireland under sect. 2. Therefore she was well removed to the appellant parish.

Order of Sessions quashed.

1851.
Nov. 22.
[645]

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(17 Q. B. 645—651; S. C. sub nom. *Re Hall* v. *The Norfolk Estuary Co.*, 21 L. J. Q. B. 94; 16 Jur. 149; 7 Rail. Cas. 503.)

A shareholder in an incorporated Company within the provisions of the Companies Clauses Consolidation Act, 1845, who has not paid up all calls due upon his shares, cannot, by sect. 16, execute a deed of transfer of any of such shares which shall be valid as against the Company: and the Company may refuse to register such deed.

WORDSWORTH, in last Trinity Term, obtained a rule calling on Thomas Twining Wing, secretary of the Norfolk Estuary Company, to show cause why a *mandamus* should not issue, commanding him to enter a memorial of a deed of transfer, dated 13th March, 1851, of twenty-four shares in the said Company, numbered &c., by Robert Wheble Bennett to James Hall, pursuant to the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

From the affidavits in support of the rule it appeared that the Norfolk Estuary Company was incorporated by stat. 9 & 10 Vict. c. ccclxxxviii. (1), which enacted, among other things, that the Companies Clauses Consolidation Act, 1845, should be incorporated with it; that 20*l.* per share should be the greatest amount of any one call; and that one month's notice should be given of each call.
[*646] It further appeared that Robert *Wheble Bennett, being possessed of twenty-four shares in the Company, sold them to James Hall on 13th March, 1851, and executed a deed of transfer of that date: that Bennett's brokers, on the same day, lodged the deed of transfer with the defendant, at the office of the Company, for registration: that Bennett had paid up all calls on the twenty-four shares (2): but that the defendant refused to register the deed of transfer.

The affidavit in answer set out sect. 16 of the Companies Clauses Consolidation Act, 1845, which enacts that "No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." The affidavit then stated that, on 5th February, 1851, a call of 2*l.* 10*s.* per share was duly made by the directors of the said Company upon all the shares, including the twenty-four in question: that on 13th March, 1851, the day of the date of the deed of transfer, the said call of 2*l.* 10*s.* in respect of

(1) Local and personal, public: "For enclosing and reclaiming from the sea certain tracts of land forming part of the great estuary called 'The Wash,' between the counties of Norfolk and Lincoln."

(2) On 13th March, 1851. But the affidavits for and against the rule were contradictory on this point.

the said twenty-four shares remained unpaid, and it continued unpaid up to 14th April, 1851, being after the day on which the deed of transfer was lodged at the Company's office for registration: and that, under these circumstances, the defendant refused to register.

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Phipson now showed cause:

The Company had the right to refuse to register the deed, which was not a proper deed of transfer. Stat. 8 & 9 Vict. c. 16, provides, by sect. 14, that every shareholder may *transfer his shares, subject [*647] to the regulations provided by that or the special Act: and that such transfer shall be by deed, which, "when duly executed," is, by sect. 15, to be delivered to and registered by the secretary. Now one of these regulations is provided by sect. 16, which declares that no shareholder shall be entitled to transfer any of his shares until he shall have paid all calls for the time being due on each of his shares. The deed, therefore, which is, in fact, the transfer, cannot be "duly" executed as long as any calls remain due upon the shares, as was the case here. Until it is duly executed, and delivered to the secretary, the vendee is, by sect. 15, not entitled to receive any profits in the undertaking, or to vote as a shareholder. A similar provision is made by sect. 18, for the protection of the Company, in the case of a transfer of shares otherwise than by deed.

(COLERIDGE, J.: As between the vendee and the Company, a transfer made while the transfer books are closed is, by sect. 17, to date from a time subsequent to the execution, namely, after the next ordinary meeting.)

That section shows that, in default of express enactment, the transfer even in that case, as between the vendee and Company, would date from the time of the execution of the deed.

(COLERIDGE, J.: There is nothing in the Act to show that a deed of transfer made while the calls upon the shares are unpaid is to be considered as a nullity. The shareholder who makes such a transfer does that which he is not authorized, as between himself and the Company, to do: but that does not necessarily make the deed void as between himself and the transferee.)

The transfer is the creature of the Act; and the Act provides that

REG. v. WING. [*648] the transfer shall be made by a deed executed under *certain conditions only. If, therefore, a deed be executed which purports to be a regular deed of transfer, those conditions not having been complied with, it is void altogether as a transfer.

(PATTESON, J.: Sect. 15, which provides that, until the "transfer" is delivered to the secretary, the vendor shall be liable for calls, seems to recognise the deed as a transfer, even while it is still undelivered.)

Any doubt which might arise upon that section is removed by the express enactment of sect. 16.

(PATTESON, J.: Suppose a shareholder executed a deed of transfer when no call was due, and delivered it to the secretary after a call had been made; would the deed be a good deed of transfer?)

Under those circumstances it probably would.

(COLERIDGE, J.: Is the transfer complete before the deed is delivered to the transferee?)

Not until it is delivered to the transferee, duly registered. The present transfer, therefore, is incomplete.

(COLERIDGE, J.: That would not be an answer to the transferee's claim in the present case: if the deed is incomplete by reason merely of non-registration, he has a right to require it to be made complete by registration. The real difficulty is, supposing the transfer to be complete before registration, as between transferor and transferee, has the transferee a right to demand registration of such transfer by the Company?

WIGHTMAN, J.: The affidavits do not state that the deed was delivered as an escrow.)

Wordsworth, contrà:

Sect. 16 is not intended to controul any right between the transferor and the transferee, but only to secure to the Company the payment of calls upon the shares; it means to provide that a shareholder shall not get rid of his liability in respect of calls due [*649] upon his shares by transferring any *of the shares while those calls are still unpaid: *Reg.* v. *Londonderry and Coleraine Railway*

Company (1), *Sayles* v. *Blane* (2). All that the Company is interested in demanding, or ought to demand, is, that, as between the Company and the vendor, the transfer is not to be complete, and the liability of the vendor to the Company in respect of the shares transferred not to be discharged, until the deed of transfer is registered, which is not to be until the vendor has paid all calls due.

(PATTESON, J.: That is, that no shareholder shall be entitled to have his transfer registered until he has paid all calls due. But the words of sect. 16 are, that "no shareholder shall be entitled to transfer" until such payment.)

Sect. 16 must be read in connection with the two preceding sections.

(COLERIDGE, J.: Is there any case where a Company has refused to register a transfer executed by a party incapacitated, by law, from transferring?)

Wordsworth mentioned *Stikeman* v. *Dawson* (3).

PATTESON, J. (4):

This rule must be discharged. I do not say that the deed in its present state, or even a mere parol contract to transfer, may not be a valid transfer as between the vendor of the shares and the vendee; but the question here is as to the meaning of the word "transfer" in the Act. It is clear, looking at the language of sects. 14, 15, in which the words "transfer" and "transfer by deed" are treated as synonymous, that, with the exception of the particular *cases of transmission provided for by sect. 18, the Act, [*650] in sect. 16, contemplates only one kind of transfer, namely, by deed, duly executed and registered according to the provisions of the Act itself. What the Legislature intended to provide was, that the interest in shares should not be transferable except by deed, nor should be so transferred, unless the transferor had previously paid up all the calls that were due, whatever other contract he might choose to make with the transferee. The Company, therefore, in the present case, had a right to refuse registration of the deed; although they would have taken a more proper course in making their objection to the deed when it was first lodged with

(1) 78 R. R. 576 (13 Q. B. 998, 1006).
(2) 14 Q. B. 205.
(3) 75 R. R. 47 (1 De G. & Sm. 90).
(4) Lord Campbell, Ch. J., was in the Court of Criminal Appeal.

REG. v. WING. them. I abstain from giving any opinion as to what would be the effect of delivering the deed to the Company as an escrow; here it was clearly not so delivered, but was lodged with the secretary on the day on which it was executed.

COLERIDGE, J.:

I am of the same opinion: but I arrive at it with regret; for the Company are standing on a purely technical and vexatious ground, inasmuch as a new deed can be forthwith made. But the provisions of the Act with respect to the transfer of shares were undoubtedly made for the benefit, and with a view to the security, of the Company, and for the purpose of preventing shares being transferred by or to improper or incompetent persons. The general right to transfer is given by sect. 14; but it is, by the same section, made subject to certain restrictions, one of which is afterwards mentioned in sect. 16. The effect of the latter section is clearly that no [*651] transfer can take place until *the transferor has paid all the calls due upon his shares. There is a difference between the language of sect. 16 and that of sects. 15 and 18. The two latter also provide for the security of the Company, but for a different case from that provided for in sect. 16: they assume the interest in the shares to have already passed. I have no doubt that, as between the transferor and transferee, the deed of 13th March is a valid contract: but it is void as against the Company; and the latter have the right to refuse to register it.

WIGHTMAN, J.:

I am of the same opinion, but also pronounce it with reluctance. Sect. 14 provides that every transfer shall be by deed; sect. 16, that no transfer shall be made unless the transferor has paid all calls due. Therefore a deed of transfer made by a transferor who has not paid all calls due is clearly no transfer at all; and the Company are not bound to register it.

Rule discharged.

SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY, &c.

1851. *Nov.* 18, 25.

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(17 Q. B. 652—670; S. C. 21 L. J. Q. B. 89; 16 Jur. 311; 7 Rail. Cas. 571; S. C. in Equity, 2 Mac. & G. 324; 7 Rail. Cas. 531; 3 Mac. & G. 652; 7 Rail. Cas. 565, 590; 16 Beav. 441; 5 Rail. Cas. 576; 4 D. M. & G. 115; 6 H. L. C. 113.)

The proprietors of a railway, U., which was in course of formation under a local Act, applied to Parliament for an Act authorising them to lease their railway to the N. W. Railway Company. Part of the line was common to the U. railway and to a third railway, the S. and B. The proprietors of the third railway opposed the bill, but ceased doing so in consideration of the agreement after mentioned, which was executed under seal by the three Companies after the Act passed, and contained four articles, viz.

1. That, at all times during the continuance of the lease, the U. or the N. W. Company should keep an account of all their traffic and receipts on the common portion of the line and from thence to a specified ulterior point; and the S. and B. Company should keep a like account of their traffic and receipts on the common portion and from thence to an ulterior point also specified. 2. That the accounts should be audited periodically and a division of profits made in proportion to the comparative lengths of the two railways from the beginning of the common portion to two ulterior points on the U. line and the S. and B. line respectively (short of the ulterior point mentioned in Art. 1). 3. That, during the continuance of the lease, the U. and N. W. Companies would not convey or carry any passengers, cattle, luggage, goods, or other matters or things, from any part of the demised line to any point of the S. and B. line, and would not use the demised line to compete for any traffic which should properly belong to the S. and B. Company. 4. (Without reference in terms to any lease): That the said agreement should not in any manner be evaded or eluded by the S. and B. Company, and that no arrangement, scheme, &c., should be resorted to or attempted by them for that purpose.

In an action of covenant by the S. and B. Company against the other Companies for breach of this agreement, the defendants demurring generally to the declaration:

Held, That the agreement was not illegal, as a fraud upon the Legislature, or as injurious to the public by depriving them of the benefits of competition, or as prejudicing the shareholders by establishing a distribution of profits other than that directed by the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, ss. 64, 120: it not appearing by any allegation that the arrangement was prejudicial to the shareholders.

Also, that it was not illegal as binding the U. and N. W. Companies not to carry soldiers and their families &c. according to stat. 7 & 8 Vict. c. 85, s. 12 (1), or the mails according to stat. 1 & 2 Vict. c. 98, s. 1, if Government should require it; for that the agreement imposed no such obligation.

The plaintiffs alleged a breach of the 4th Article, stating generally, and without reference to the making or continuance of any lease, that the defendants did, on &c. and continually &c., evade and elude the said covenants and agreements: Held, on general demurrer, a sufficient allegation

(1) Repealed, with savings, 46 & 47 Vict. c. 34, s. 10; see *ib.*, s. 6.—A. C.

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of breach; the making of a lease not appearing by the record to be a condition precedent to the fulfilling of the 4th Article.

Also that it was not necessary to allege in this breach that half the capital of the U. Company had been subscribed and the subscription certified, though the leasing Act provided that no lease should be granted until such subscription had been certified.

COVENANT. The first count of the declaration stated that, before and at the time of the making of *the indenture after mentioned, [*653] to wit, on 12th October, 1847, a certain line of railway was in course of formation between Shrewsbury in the county of Salop and Wellington in the same county; and thereupon afterwards and before the commencement of this suit, to wit &c. (same day and year), by a certain indenture under the name of articles of agreement then made between plaintiffs of the one part and defendants of the other part, and one part of which &c. (*profert* of the deed, sealed by defendants), the date whereof is the day and year last aforesaid, after reciting, amongst other things, as the fact was, that the said line of railway in course of formation between Shrewsbury aforesaid and Wellington aforesaid was common to the plaintiffs and the said Shropshire Union Railways and Canal Company, and was under the direction and controul of a joint committee of management, and that a bill had been introduced into Parliament during the then last preceding session for authorizing a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the London and North Western Railway Company, and that the same had been opposed by the plaintiffs, and that the plaintiffs had agreed to withdraw their opposition to the said bill on its being mutually arranged and agreed between the said several Companies that the covenants and agreements thereinafter contained should be mutually entered into by them on an Act of Parliament being obtained for authorizing such lease as aforesaid or a lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford: [*654] And reciting that such Act (1) had been *obtained during the last preceding session of Parliament: It was witnessed, and it was thereby mutually covenanted and agreed by and between the said plaintiffs and defendants, the defendants covenanting for themselves for and in respect of their own acts and deeds only, and the plaintiffs covenanting for themselves &c. only, and not the one contracting party for the acts and deeds of the other:

(1) Stat. 10 & 11 Vict. c. cxxi., local and personal, public: see, p. 606, note (1), *post*.

That the said Shropshire Union Railways and Canal Company or the London and North Western Railway Company should and would, from time to time and at all times thereafter during the continuance of any such lease authorized to be granted by such Act, make and keep a separate and distinct account of all passengers, cattle, luggage, goods and other matters and things which such Companies or either of them should convey or carry from Shrewsbury or Wellington, or from any point between those two places to Rugby (1), or to any place to the south of or on the London side of Rugby on the line of the London and North Western Railway Company, and also of all passengers &c. (the like agreement as to passengers &c. from Rugby, or any place to the south or on the London side of Rugby on the above line, to Wellington or Shrewsbury or any point between): and also a like separate and distinct account of all sum and sums of money which such last-mentioned Companies or either of them should receive for the carrying or conveyance of all passengers &c. and things whatsoever of or respecting which they were to keep such separate and distinct accounts as aforesaid. And also *that the said Shrewsbury and [*655] Birmingham Railway Company should and would in like manner and during the like period make and keep a separate and distinct account of all passengers &c. (as before) which such last mentioned Company should convey or carry from Shrewsbury or Wellington or from any point between them to Rugby, or to any place to the south or on the London side of Rugby, upon the line of the said London and North Western Railway Company, or to London either upon the said last mentioned line or upon that of any other Company; and a like separate and distinct account of all sum and sums which the said Shrewsbury and Birmingham Company should receive for the carrying or conveyance of such passengers &c. of which they were to keep such separate and distinct accounts as aforesaid.

And, further, that the said Shropshire Union Railways and Canal Company or the said London and North Western Railway Company on the one part and the said Shrewsbury and Birmingham Railway Company on the other part should respectively &c.; mutual agreement to make out and supply half yearly accounts in abstract of the matters mentioned in the first article or clause;

(1) From the termination of the common line at Wellington two lines diverged, the one to Stafford, the other to Wolverhampton; and these were continued, respectively, by further lines, to Rugby.

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such account to be subject to be audited by the respective auditors and to be open at all reasonable times to inspection by the directors of either Company &c.: the auditors of the contracting Companies from time to time to ascertain and determine how much of the moneys by such accounts appearing to have been received should have been received for or in respect of the distance from Shrewsbury or Wellington or from any point between them to Stafford or Wolverhampton, or from Stafford or Wolverhampton to Shrewsbury or Wellington or to any point between; and that the sum so ascertained should *be divided between the said Shropshire Union Railways and Canal Company and London and North Western Railway Company as one party and the said Shrewsbury and Birmingham Railway Company as the other party, in certain proportions (which were specified) corresponding with the relative lengths of the line of the Shropshire Union Railways and Canal Company from Wellington to Stafford and the line of the Shrewsbury and Birmingham Railway Company from Wellington to Wolverhampton.

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And, further, that, during the continuance of any such lease as aforesaid, the said Shropshire Union Railways and Canal Company and London and North Western Railway Company, or either of them, should not nor would convey or carry any passengers, cattle, luggage, goods, or other matters, or things, from Shrewsbury aforesaid or Wellington aforesaid, or from any point between those two places, to any point or place on the line of the Shrewsbury and Birmingham Railway or the Birmingham, Wolverhampton and Stour Valley Railway, nor use the line of the Shropshire Union Railway by Gnosall or Stafford to compete for any traffic which should properly belong to the Shrewsbury and Birmingham Railway.

And the defendants did by the same indenture further covenant with the plaintiffs: That the agreement thereby come to should not in any manner be evaded or eluded by them the defendants, and that no arrangement, scheme, device or contrivance should be resorted to or attempted by them for that purpose (1).

(1) The entire article here referred to was set out on *oyer* as follows:—

"Fourthly. That the agreement hereby come to shall not in any manner be evaded or eluded by either of the contracting parties, nor shall any arrangement, scheme, device or contrivance be resorted to or attempted for that purpose; and, in case any attempt shall be made by either of the contracting parties to evade or elude the arrangement hereby made, or in case any question or dispute shall arise between the contracting parties on the import or construction of these Articles or any matter herein

As by the same indenture &c. will appear. Averment of performance by plaintiffs.

Breach: 1. That, after the making of the said indenture, and before the commencement of this suit, to wit on 1st December, 1849, the said London and North Western Railway Company conveyed and carried, and from thence hitherto have continued to convey and carry, divers passengers, cattle, luggage and goods, to wit at the rate of 1,000 passengers, &c., a day, during the time aforesaid, from Shrewsbury aforesaid and Wellington aforesaid, and from certain points between those two places, viz., from &c. (specifying them), viz. to certain points and places on the line of the Shrewsbury and Birmingham Railway, viz. &c. (specifying the points and places), and also to certain points and places on the line of the Birmingham, Wolverhampton and Stour Valley Railway, to wit &c. (specifying them).

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2. That, after the making &c., and before the commencement &c., to wit on &c., the said London and North Western Railway Company did use, and from thence hitherto have continued to use, the line of the said Shropshire Union Railway by Gnosall and Stafford to compete, and for the purpose of competing, and thereby *during all that time did compete, for certain traffic, to wit certain traffic on the same line of railway of great value, to wit the value &c., which properly belonged to the plaintiffs; and by reason thereof the said Company obtained the said traffic, being of great value, to wit &c., and deprived plaintiffs thereof.

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3. That, after &c., and before the commencement &c., to wit on 1st December, 1849, the said Shropshire Union Railways and Canal Company did convey and carry, and from thence hitherto have continued to convey and carry &c.: breach by carrying passengers, goods, &c., as charged against the London and North Western Company in the second breach.

4. Breach for use of the line by Gnosall and Stafford by the London and North Western Railway Company to compete &c. (as in the 2nd breach, but omitting the words "and thereby during all that time did compete"); contrary to the tenor and effect &c. of

contained, the same shall be referred at the request of either of the said Companies to the arbitration and determination of Robert Stephenson, Esq., and, in case of the death or absence of the said R. Stephenson, then to the arbitration and determination of an umpire to be appointed by the Railway Commissioners, or other Government Board entrusted with the supervision of railways, in case of the said parties hereto, their successors or assigns, not agreeing in the nomination of such umpire."

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the said covenants in that behalf; whereby the last mentioned Company obtained the said traffic, being of great value, to wit &c., and deprived plaintiffs thereof.

5. That, after the making &c., and before the commencement &c., to wit on 1st December, 1849, "the defendants did evade and elude, and thence continually until and at the time of the commencement of this suit have continued to evade and elude, the said covenants and agreements and each of them in the said indenture contained; and during all that time the defendants have resorted to and attempted divers arrangements, schemes, devices and contrivances for the purpose of evading and eluding the same covenants and agreements and each of them; contrary to the tenor and effect" &c. of their said covenants &c.

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There was a second count, which it is not necessary to set forth.

The London and North Western Railway Company, after *oyer* of the indenture (which was set out, containing the four articles of agreement recited in the declaration, and a fifth enabling the plaintiffs to determine the agreement by a six months' notice), demurred generally "as to so much of the said first count as relates to the said supposed breach of covenant fifthly above assigned." Joinder (1).

(1) The following Acts, local and personal, public, were referred to on the argument of the demurrer.

Stat. 9 & 10 Vict. c. cccvii., "for making a railway from Shrewsbury to Wolverhampton, with a branch, to be called 'The Shrewsbury and Birmingham Railway.'" Sect. 3 incorporates "The Shrewsbury and Birmingham Railway Company." Sect. 32 recites "that the railway by this Act authorized between Shrewsbury and a point at or near Wellington is identical with part of the line of a projected railway from Shrewsbury to Stafford, for which a bill is now pending in Parliament, and which is proposed to be carried into effect by the said Shropshire Union Railway and Canal Company;" and enacts "that, in the event of the said last mentioned bill passing into a law during the present or the next ensuing session, the railway by this Act authorized between Shrewsbury and the said point at or near Wellington aforesaid, and all stations connected therewith (save as hereinafter excepted) shall be constructed at the joint expense of the Company hereby incorporated and of the said Shropshire Union Railway and Canal Company under the direction and control of a joint committee of management to be appointed as hereinafter mentioned, and shall thenceforth be maintained and managed at the joint expense of the said two Companies under the superintendence and control of the said joint committee, and may be used by each of the said Companies respectively for the purposes of their respective traffic free from all payment whatsoever to the other of them."

Stat. 10 & 11 Vict. c. cxxi. (Royal assent July 2nd, 1847), sect. 1, recites three Acts of the preceding session (9 & 10 Vict. chaps. cccxxii., cccxxxiii., "for making a railway from Shrewsbury to Stafford," &c., and cccxxiv.) by which Acts the Shropshire Union Railways and Canal Company were authorized to make certain railways in the said Acts mentioned: It recites further that "it has been agreed between the Shropshire Union Railways

The demurrer was argued in this Term (1).

Cowling, for the defendants:

First: The fifth breach *is defective in not averring that a lease had in fact been granted, according to such agreement as is contemplated in stat. 10 & 11 Vict. c. cxxi. sect. 1. Article 4 of the indenture does not in terms refer to the granting of a lease; but its meaning must be that, if a lease be granted, the agreement

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and Canal Company and the London and North *Western Railway Company, with a view to the economical and convenient working of the railways by the said recited Acts authorized to be made, that a lease in perpetuity of the undertaking of the Shropshire Union Railways and Canal Company should be granted to the London and North Western Railway Company, and accepted by them, upon the terms hereinafter mentioned;" and it then enacts: "That on the completion of the works of the railways by the said recited Acts authorized to be made so as to be opened for public traffic, or at such earlier period as may be agreed upon between the said Companies, the Shropshire Union Railways and Canal Company shall and they are hereby empowered and required to grant, and the London and North Western Railway Company shall and they are hereby empowered and required to accept, a lease in perpetuity of the undertaking of the said Shropshire Union" &c. "Company at a rent" &c.

[*660, *n.*]

Sect. 11 enacts: "That when and as each of the said" (Shropshire Union) "railways shall be completed and opened the same shall be worked and used by the London and North Western Railway Company;" "and for the purposes of such working and use the said London and North Western Railway Company, and their officers, agents, and servants, shall have, use, and exercise all such powers and privileges in relation to every such completed railway as were granted to the Shropshire Union" &c. "Company, and their officers, agents, and servants, by the Act authorizing them to maintain and work and use such railway, and as if the name of the London and North Western Railway Company had been inserted in such Act in lieu of the name of the Shropshire Union" &c. "Company, and so from time to time as each of the said railways shall be completed."

Sect. 31 enacts: "That it shall not be lawful for the said Shropshire Union Railways and Canal Company, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said London and North Western Railway Company to enter into or accept such lease of the undertaking of the first mentioned Company, unless it shall have been proved to the satisfaction of the Commissioners of Railways, and certified by them under their seal previously to the execution of such lease, that one half of the whole amount of the capital, exclusive of loans, by the Act or Acts relating to each of the said Companies authorized to be raised, has been actually *paid up and expended for the purposes authorized by such Act or Acts respectively."

[*661, *n.*]

Each of the above Acts of 9 & 10 Vict. expressly embodies the Companies, Lands and Railways Clauses Consolidation Acts, 1845, 8 & 9 Vict. c. 16, c. 18, and c. 20, as to the powers of the directors, and of the Company in general meetings, distribution of capital into shares, &c., so far as the clauses are applicable and not inconsistent &c.

(1) November 18th. Before Lord Campbell, Ch. J., Patteson, Coleridge and Wightman, JJ.

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embodied in it shall not be evaded. Not only does the declaration omit to show that a lease was in fact granted, but it does not show that the Commissioners of Railways granted a certificate of half the capital having been subscribed; without which no lease could have been granted: stat. 10 & 11 Vict. c. cxxi. s. 31. Secondly: The indenture on which the plaintiffs bring this action is illegal in its provisions. Lord TRURO, L. C., in *The Shrewsbury and Birmingham Railway Company* v. *The London and North Western Railway Company* (1), desired that the present action might be brought, mainly for the purpose of trying this point. The indenture is a fraud upon Parliament, being made, after the passing of the Act, to embody an arrangement entered into while the Act was passing, concealed from the Legislature, and comprising provisions which materially affect the Act in its operation, and might, if known, have had influence on the fate of the bill. The Act is passed on certain terms: the agreement stipulates *against those terms, and is a prospective violation of the Act. It converts the public Act into a trust for the plaintiffs.

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(LORD CAMPBELL, Ch. J.: Is there anything in the agreement by which the public may suffer?)

Article 3 deprives them of the benefit of competition: it enables the plaintiffs safely to charge higher fares. Lord DENMAN, Ch. J., delivering judgment in *Lord Howden* v. *Simpson* (2) (an action of debt upon an agreement by which plaintiff was induced to forbear opposing a railway bill), said: We think that, the plea and agreement being taken together, an answer to the declaration is disclosed, on the ground that the latter had in contemplation that which was inconsistent with material allegations in the preamble and provisoes in the clauses of the intended bill, and that to conceal such an agreement from the Legislature was in the eye of the law a fraud upon it, and any contract founded on such concealment contrary to good faith."

(COLERIDGE, J.: The judgment was reversed (3).)

The principle was not denied. The ground of reversal was that the

(1) 3 Mac. & G. 70. On dissolving an injunction against the London and North Western and Shropshire Union Companies, with liberty to plaintiffs to bring an action.

(2) 50 R. R. 555 (10 Ad. & El. 793, 800).

(3) *Lord Howden* v. *Simpson*, 50 R. R. 565, 565 (10 Ad. & El. 807), in Ex. Ch.; *Simpson* v. *Lord Howden*, in Dom. Proc., 50 R. R. 575 (9 Cl. & Fin. 61).

record did not show any agreement to keep the transaction secret from the Legislature.

(LORD CAMPBELL, Ch. J.: The concealment is a matter we can hardly look at. If you showed that the agreement contravened the statute, it would be different. What is the Legislature? Suppose it is shown that the agreement was concealed from the Honourable Mr. A. or Mr. B.; can we enquire into that?)

Here a monopoly is conceded which does deprive the public of a benefit contemplated by the statute. And the arrangement for dividing the profits, though not *affecting the public, might prejudice shareholders, by influencing the terms of the lease to be granted under stat. 10 & 11 Vict. c. cxxi. [*663]

(LORD CAMPBELL, Ch. J.: They must be deemed privy to the arrangement.)

Mortgagees are not. Further, an agreement of this kind is at variance with the provisions of stat. 8 & 9 Vict. c. 16 (Companies Clauses Consolidation Act, 1845), sect. 64, which provides that the stockholders respectively shall be entitled to participate in the dividends and profits of the Company, such dividends to be apportioned among them according to the amount of their respective interests; that is, by sect. 120, "according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid."

(LORD CAMPBELL, Ch. J.: That is, according to the profits of the concern generally, not of a particular section.)

The directors could not sell the concern: neither can they carry it into a partnership. Lord COTTENHAM appears to have viewed this agreement in the light of a contract for partnership, which, however, he thought might be beneficial to the "minor Company"(1). But a court of law will ask what right the Companies had to engage their shareholders in a partnership at all.

(LORD CAMPBELL, Ch. J.: This is not a general partnership.)

The Company has no right to make away with any of its dividends.

(1) *The Shrewsbury and Birmingham Railway Company* v. *The London and North Western Railway Company*, 2 Mac. & G. 324, 352, 353. On demurrer to a bill by plaintiffs against defendants for a specific performance, and for an injunction; when the demurrers were overruled.

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(LORD CAMPBELL, Ch. J.: Might not they agree with an engine maker that he should be paid by receiving all the tolls they took on a given day?)

That would be a purchase of something for the use of the railway itself.

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(LORD CAMPBELL, Ch. J.: Here it is an outlay for the purpose of increasing the dividends.)

They have no right to speculate.

(LORD CAMPBELL, Ch. J.: A jury would decide whether the arrangement were a *bonâ fide* agreement or not.)

The third article would prohibit the defendants from carrying any passenger, matter or thing on the line from Shrewsbury or Wellington, or from any point between those places &c. to termini which are stated; whereas, by stat. 1 & 2 Vict. c. 98 ("to provide for the conveyance of the mails by railways"), sect. 1, they are bound so to carry the mails or post letter bags if required by the Postmaster-General. So, by stat. 7 & 8 Vict. c. 85 ("to attach certain conditions to the construction of future railways" &c.), sect. 12, they would be bound to carry the military, marine and police forces there mentioned, on production of a proper order: but this article would bind them, in certain cases, not to do so.

Peacock, contrà:

This action was not directed by the LORD CHANCELLOR.

(LORD CAMPBELL, Ch. J.: We must treat it as an ordinary action, and merely look at the record.)

There is no fraud on the Legislature. The London and North Western Railway Company were about to obtain an Act authorizing a lease to them in perpetuity of the Shropshire Union Company's line. The plaintiffs, a third Company, oppose this unless a clause be put in for their protection; and with a view to such protection merely this agreement is come to.

(LORD CAMPBELL, Ch. J.: If the Legislature give two Companies the power of travelling the same railway, is not their competition a benefit to the public, which the *public loses if they agree not to compete?)

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Neither Company is bound to travel on the line; and one of them may agree with the other on the subject, for its own protection. In *Edwards* v. *The Grand Junction Railway Company* (1), a railway bill was depending before Parliament, and the trustees of a road were opposing the bill and pressing to have certain clauses inserted; the promoters of the bill agreed, if the opposition were withdrawn, and the clauses not pressed, to execute an instrument embodying their substance under the seal of the Company when it should be incorporated; and this was held to be an agreement which a court of equity should enforce.

(LORD CAMPBELL, Ch. J.: The question is, whether the contract be in violation of the intentions of the Legislature.)

The stipulations here are not so, but merely a fair protection of existing interests. As to suppressing competition, the agreement goes no farther than the ordinary compact not to trade within a certain distance. Lord COTTENHAM did not decide these points; but his opinion was clearly against the objection. Lord TRURO, L. C. left them open to the decision of a court of law. There is no illegality as against the stockholders.

(LORD CAMPBELL, Ch. J.: We do not think much of that point.)

As to the conveyance of mails and of troops; the agreement could not be meant to prohibit what the Company was obliged by statute to do.

(LORD CAMPBELL, Ch. J.: Troops could hardly be called passengers. And the agreement must be limited to what the Company could lawfully forbear doing.)

They could not have been sued under the agreement if they had carried troops. It does not then appear on the face of the indenture itself, nor by *averment on the record, that the agreement was not a *bonâ fide* and legal one. [*666]

Then as to the 5th breach. The indenture contains three articles of agreement to do, and not to do, certain things during the continuance of the lease. But the fourth, to which this breach refers, is general: that the agreement "shall not in any manner be evaded," without reference to the continuance of a lease, or to any limited period. The granting of a lease was not a condition

(1) 43 R. R. 265 (1 My. & Cr. 650).

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precedent to the performance of this article. The breach is, that the defendants, on &c., did evade and elude, and thence continually have evaded and eluded &c.

(LORD CAMPBELL, Ch. J.: There is no special demurrer.)

The defendants admit on the record that they have evaded and eluded, but insist now that a lease does not appear to have been granted. But the doing of certain acts before lease granted is the very evasion complained of.

Cowling, in reply:

The only interest really protected by this agreement is the interest in a monopoly which is contrary to the intention of the Legislature shown by stat. 10 & 11 Vict. c. cxxi. s. 11, that the railways should be worked under the lease as they would have been under the original Acts. As to the carriage of troops and mails, the language of the agreement is express, and prohibits it.

(LORD CAMPBELL, Ch. J.: To carry soldiers or letters in obedience to an order of Government can hardly be called acting as carriers of "passengers" or "goods." The terms of the agreement must be construed as relating to voluntary acts; to the carrying of what the Company might refuse to carry.)

[*667] Stat. 7 & 8 Vict. c. 85, s. 12, would require them to *convey not only soldiers but their wives, families and baggage. The agreement excludes every thing, without allowing any excuse, unless perhaps the act of God and the Queen's enemies. As to the 5th breach: the article referred to clearly contemplates the evasion of things to be done under a lease, though a lease is not mentioned. And the breach, as worded, does not strictly follow the words of the 4th Article.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered the judgment of the COURT:

This was a general demurrer to the fifth breach assigned in a declaration in an action for breach of covenants contained in certain articles of agreement made between the plaintiffs and the defendants. The articles themselves are set out *in extenso* by the defendants upon *oyer;* and by the fourth article it is provided "that the agreement hereby come to shall not in any manner be evaded or eluded by either of the contracting parties, nor shal

any arrangement, scheme, device or contrivance be resorted to or attempted for that purpose."

The fifth breach is assigned upon that article in the terms of it, alleging that the defendants did evade and elude the agreement, and resorted to and attempted divers arrangements, schemes, devices and contrivances for the purpose of evading and eluding the agreement. To this breach the defendants demurred generally, on the grounds, as stated upon the argument: 1. That the declaration was defective in not containing an averment that the capital had been subscribed and a certificate granted, and that a lease had been made as mentioned in the agreement; the defendants contending that the *different articles in the agreement were only [*668] binding during the existence of such lease; and, 2. That the agreement itself was wholly void as a fraud upon the Legislature, the public, and the shareholders of the respective Companies.

With respect to the first of these objections, that there is no averment of the subscribing the capital, granting the certificate, or of the making or existence of the lease, it is sufficient to observe that the article upon which the fifth breach is assigned is wholly independent of and unconnected with the subscription of the capital, granting the certificate, or the making or existence of a lease. It may be that the evasion and elusion complained of in the fifth breach is the impeding the completion of those very matters, or attempting by schemes and devices to prevent them being completed or the lease obtained. We are therefore clearly of opinion that that objection cannot be sustained.

The question then is, whether the agreement is void in law. As it has been clearly stated that an agreement to withdraw opposition to a railway bill for a pecuniary or other consideration is not illegal, the agreement in question would only be void in case it was illegal upon other grounds, such as those suggested on the part of the defendants, that it was injurious to, and therefore in a legal sense a fraud upon, the public or the shareholders. The defendants' counsel contended that it is injurious to the public by giving in effect a monopoly to the plaintiffs, and thereby depriving the public of the benefit that might be derived from competition. If this were so, and the parties proposed by their agreement to endeavour to prevent competition generally, there might be weight in the objection; but the effect of the agreement is only that the one Company shall not *compete or interfere with the other upon [*669] the particular line mentioned in the agreement. This is no more

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illegal than it would be for two persons engaged in trade to agree that one shall not exercise his trade nor compete with the other within a particular district.

It was also objected that it was void as injurious to the shareholders of the Company and a fraud upon them by the stipulation to divide the profits. If such a stipulation were necessarily injurious to the shareholders, the objection might be valid: but this arrangement may be greatly for the benefit of the shareholders; and without such co-operation of the two Companies perhaps no profits would be made.

The same objections to the validity of this agreement were urged in the case in Chancery between the same parties, before the late Lord Cottenham, as reported in the 2nd volume of Macnaghten & Gordon's Reports, p. 324. The case was fully argued; and, in an elaborate judgment delivered by Lord COTTENHAM, he held that there was nothing in the agreement contrary to the duty which the parties respectively owed to Parliament, or to the public and their own subscribers.

But, before stating our own entire concurrence with the judgment of the LORD CHANCELLOR, it is necessary to advert to an objection to the legality of the agreement which was not taken when the case was before him, or at least is not adverted to by him. This objection was founded upon the 3rd article of the agreement, by which it is provided that the "Shropshire Union Railways and Canal Company and London and North Western Railway Company, or either of them, shall not nor will convey or carry any passengers, cattle, luggage, goods, or other matters, or
[*670] things," from Shrewsbury or Wellington, or *from any point between those two places, to any point or place on the line of the Shrewsbury and Birmingham Railway or the Birmingham, Wolverhampton and Stour Valley Railway nor use the line of the Shropshire Union Railway by Gnosall or Stafford to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway.

This clause in the agreement is said to be contrary to the Acts of Parliament which contain provisions for the conveyance of her Majesty's troops and the mails by railways, obligatory on the Railway Companies. It may well be doubted whether the conveyance of her Majesty's troops or mails under the compulsory clauses in the statutes referred to would come within the intention and meaning of the 3rd clause by the terms "passengers, cattle,

luggage, goods, or other matters, or things"; the parties only intending to include whatever might come within the ordinary interpretation of those terms: but we are of opinion that there is nothing in that clause in derogation of the right of the Crown to send soldiers or mails by railway to any place within the prescribed limits, as they may go by the Shrewsbury and Birmingham Railway or the Birmingham, Wolverhampton and Stour Valley Railway to the places within the specified limits. There is nothing in the clauses of the statutes relating to the conveyance of the troops or mails which would oblige the defendants to become carriers upon particular parts of a line which they would not otherwise be, instead of another Company with whom they have engaged not to compete as carriers upon that line.

Upon the whole case we are of opinion that the objections taken by the defendants cannot be supported, and that the plaintiffs are entitled to our judgment.

Judgment for plaintiffs.

REG. *v.* ROWLANDS AND OTHERS (1).

1851. *Nov.* 21, 24.

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(17 Q. B. 671—688; S. C. 21 L. J. M. C. 81; 2 Den. C. C. 364; 5 Cox, C. C. 436; 16 Jur. 268.)

Indictment charged defendants with conspiring to force workmen hired and employed by P. in his business of a japanner to depart from their said employment.

By unlawfully "molesting" the said workmen.

By unlawfully "using threats" to the said workmen.

By unlawfully "intimidating" the said workmen.

By unlawfully "molesting" P.

By unlawfully "obstructing" P., so carrying on his said business, and the workmen so hired, &c.:

Held that these counts were sufficiently full and certain, and that the means by which the conspiracy was to be carried on were well stated in the words of stat. 6 Geo. IV. c. 129, s. 3 (2).

Other counts charged a conspiracy to force P. to make an alteration in the mode of conducting his business,

By "molesting" P.

By "obstructing" P. by inducing and persuading workmen hired and employed by him in his business to leave their said hiring and employment:

Held good counts.

Other counts stated that persons were being hired and employed as workmen for P. in his trade, and that defendants conspired,

By molesting and obstructing such workmen as aforesaid as might be

(1) Cited, *Mogul Steamship Co.* v. *McGregor* (1889) 23 Q. B. D. 618, 58 L. J. Q. B. 465 (affd. [1892] A. C. 25, 61 L. J. Q. B. 295); *Quinn* v. *Leathem* [1901] A.C. 495; 70 L. J. P. C. 76; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A.C. 239, 74 L. J. K. B. 525, 92 L. T. 710.—A. C.

(2) Repealed by 34 & 35 Vict. c. 32, s. 7.

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willing to be hired, &c. by P. in his said trade, &c., and who were not then hired and employed by P. or by any other person, and

By using threats and intimidation to such workmen as aforesaid who might be willing &c.,

To prevent and endeavour to prevent the said workmen, so willing &c., from hiring themselves to and accepting work from P. as aforesaid in his said trade, &c.:

Held good counts.

Another count (framed with reference to stat. 4 Geo. IV. c. 34, s. 3)(1), charged that divers, to wit &c. persons, being artificers, had contracted with P. to serve him as workmen and artificers in his said trade and business for certain times agreed upon, and had entered into such service: and that defendants conspired by divers subtle means and devices to induce and persuade such artificers, so having contracted &c., and so having entered &c., unlawfully to absent themselves from the said service without the consent of P. before the terms of the respective contracts were completed.

Another count stated that H. (an individual workman) had in like manner contracted with P., and entered &c., and that defendants conspired, by divers subtle means and devices and illegal acts and practices, and by intoxicating the said H., to induce and persuade H. &c. (as in the preceding count):

Held good counts.

Other counts charged: That defendants, intending to oppress P. in his said trade, conspired by divers subtle means and devices, and by intoxicating and thereby rendering senseless the workmen of P. in his said trade, to convey to a distance and carry away the said workmen, and thereby prevent them from continuing to work for P. in his said trade.

And that defendants conspired, by divers subtle &c. and by illegal acts and practices, and by molesting and rendering intoxicated the workmen employed by P., and inducing them to depart from the said employment and break their contracts with P., to force and compel P. to alter and thereby increase the amount of wages which he paid to his workmen:

Held good counts.

Other counts alleged:

That defendants conspired unlawfully to intimidate, prejudice, and oppress P. in his trade and occupation as a japanner, and to prevent his workmen from continuing to work for him in his said trade.

That defendants conspired by divers subtle means and devices and wicked acts and practices to injure and oppress P. in his trade, business &c. of &c., and to induce his workmen to depart from their hiring and employment with P. before the period of their agreement with him was completed. And

That defendants conspired unlawfully to intimidate, prejudice and oppress P. in his trade and occupation of &c., and to entice and seduce away the workmen of P. from the employment of P., and thereby to injure and oppress him in his said trade.

Semble, that these were bad counts, as being too vague.

INDICTMENT, removed into this Court by *certiorari*. It contained the following counts.

[672] 1. That, before and at the time of the committing &c., Richard Perry and George Henry Perry carried on trade and business as manufacturers of japanned and tin wares at Wolverhampton in

(1) Repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17.

the county of Stafford under the name, firm &c., of Richard Perry & Son: and that divers, viz. fifty, persons were workmen and were hired and employed by and worked as workmen for the said R. P. and G. H. P. in their said trade and business: And that Harry Rowlands, late of &c. (names and descriptions of the defendants), with divers other evil disposed persons, on &c., with force and arms, at &c., did amongst themselves unlawfully conspire, combine, confederate and agree together, by unlawfully molesting the said workmen so hired and employed by and working for the said R. P. and the said G. H. P. in their said trade and business as aforesaid, to force and endeavour to force the said workmen so hired and employed by and working for the said R. P. and G. H. P. as aforesaid in their said trade &c. as aforesaid to depart from their said hiring, employment and work: To the great damage of the said R. P. and G. H. P., to the evil example &c., and against the peace &c.

2. Like the first count, only stating the means to be, *by unlawfully using threats to the said workmen so hired and employed &c. [*673]

3. Like the preceding, but stating the means to be, by unlawfully intimidating the said workmen so hired &c.

4, 5, 6. Counts similarly framed, for conspiring to force individual workmen, named, to depart from their hiring, by the means stated in counts 1, 2, 3, respectively.

7. Inducement as in count 1, stating that divers, to wit fifty, persons were workmen and were hired and employed by and worked for R. P. and G. H. P. in their said trade as aforesaid: And that defendants, with divers &c., did unlawfully conspire &c., by unlawfully molesting the said R. P. and G. H. P., to force and endeavour to force the said workmen so hired &c. and working &c. to depart from their said hiring, employment and work: To the great damage &c.

8. Like count 7, but stating the means to be, by unlawfully obstructing the said R. P. and G. H. P., so carrying on their trade and business as aforesaid, and the said workmen so hired &c. by and working for the said R. P. and G. H. P. as aforesaid in their said trade and business as aforesaid.

9. That R. P. and G. H. P. carried on trade &c. at &c.: And that defendants, with divers other &c., at &c., on &c., did unlawfully conspire &c. by molesting the said R. P. and G. H. P. to force and endeavour to force the said R. P. and G. H. P., so carrying on their

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trade &c. as aforesaid, to make an alteration in the mode of conducting and carrying on their said trade &c. as aforesaid: To the great damage &c.

10. Inducement, that fifty workmen were hired &c. by R. P. and G. H. P., as in former counts: Allegation that defendants, with divers
[*674] &c., conspired &c., "by *obstructing the said R. P. and G. H. P. by inducing and persuading the said workmen in the hiring and employment of the said R. P. and G. H. P., so carrying on business as aforesaid, to leave their hiring, employment and work, to force and endeavour to force the said R. P. and G. H. P., so carrying on trade and business as aforesaid, to make an alteration in the mode of conducting and carrying on their said trade" &c. as aforesaid: to the great damage &c.

11. That R. P. and G. H. P. carried on trade &c.: and that divers persons were being hired and employed as workmen for the said R. P. and G. H. P. in their said trade and business: And that defendants, with divers &c., on &c., unlawfully conspired &c. by molesting and obstructing such workmen as aforesaid as might be willing to be hired and employed by the said R. P. and G. H. P. in their said trade and business as aforesaid, and who were not then hired and employed by the said R. P. and G. H. P. or by any other person, to prevent and endeavour to prevent the said workmen, so willing to be employed and hired by the said R. P. and G. H. P. in their said trade &c. as aforesaid, from hiring themselves to and from accepting work and employment from the said R. P. and G. H. P. as aforesaid in their said trade &c. as aforesaid: to the great damage &c.

12. Like count 11, but stating the means to be, by unlawfully using threats and intimidation to such workmen as aforesaid who might be willing &c.

13. That R. P. and G. H. P. carried on trade &c.: And that divers, to wit fifty, persons, being artificers, had contracted with
[*675] the said R. P. and G. H. P. to *serve them as workmen and artificers in their said trade and business for certain times and periods respectively agreed upon between them and the said R. P. and G. H. P.; and the said persons so being such artificers as aforesaid had entered into the service of the said R. P. and G. H. P. as such manufacturers as aforesaid: And that defendants, with divers &c., unlawfully conspired &c. by divers subtle means and devices to induce and persuade such artificers, so having contracted with the said R. P. and G. H. P. as aforesaid to serve them

in their said trade and business for certain times &c. as aforesaid and so having entered into the service &c. as aforesaid, unlawfully to absent themselves from the said service of the said R. P. and G. H. P. without the consent of the said R. P. and G. H. P. or either of them, before the respective terms of the said contracts as aforesaid were completed: To the great damage &c.

14. Inducement, that William Hodson, being an artificer, had contracted &c.: Averments, similar to those in count 13, of contract for service as a workman and artificer for a period &c. (specified) on terms agreed upon between them, and entry into the service: Allegation that defendants, with divers &c., conspired &c., by divers subtle means and devices and illegal acts and practices, and by intoxicating the said W. Hodson, to induce and persuade the said W. Hodson, such artificer as aforesaid and so having contracted &c. as aforesaid, to serve &c. for the said period on the said terms so as aforesaid agreed upon between them the said W. Hodson and the said R. P. and G. H. P. as aforesaid and so having entered into the service &c. as aforesaid, unlawfully to absent himself from the service of the said R. P. and G. H. P. without the consent of the said *R. P. and G. H. P. or either of them, before the term of the said contract as aforesaid was completed: To the great damage &c.

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15. A similar count to the 14th; laying a conspiracy by the like means to induce &c. Thomas Griffiths unlawfully to absent himself &c.

16. That defendants, with divers &c., conspired unlawfully to intimidate, prejudice and oppress one Richard Perry and one George Henry Perry in their trade and occupation as manufacturers of japanned and tin wares, and to prevent the workmen of the said R. P. and G. H. P. from continuing to work for the said R. P. and G. H. P. in their said trade and occupation.

17. That defendants, with divers &c., conspired by divers subtle means and devices and wicked acts and practices to injure and oppress the said R. P. and G. H. P. in their trade, business and occupation of manufacturers of tin and japanned ware, and to induce the workmen of the said R. P. and G. H. P. to depart from their hiring, employment and work with the said R. P. and G. H. P. before the period of their agreement with the said R. P. and G. H. P. was completed.

18. That defendants, with divers &c., wickedly intending to injure and oppress the said R. P. and G. H. P. in their trade and business

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as manufacturers of japanned and tin wares, unlawfully conspired &c., by divers subtle means and devices and by intoxicating and thereby rendering senseless the workmen of the said R. P. and G. H. P. in their trade and business, to convey to a distance and carry away the said workmen of the said R. P. and G. H. P., and thereby to prevent the said workmen from continuing to work for the said

[*677] *R. P. and G. H. P. in their said trade and business as aforesaid.

19. That defendants, with divers &c., conspired &c. unlawfully to intimidate, prejudice and oppress one Richard Perry and one George Henry Perry in their trade and occupation of manufacturers of japanned and tin wares, and to entice and seduce away the workmen of the said R. P. and G. H. P. from the employment of the said R. P. and G. H. P., and thereby to injure and oppress the said R. P. and G. H. P. in their said trade and occupation.

20. That defendants, with divers &c., unlawfully conspired &c. by divers subtle means and devices and by illegal acts and practices, and by molesting and rendering intoxicated the workmen in the employment of the R. P. and G. H. P., and by inducing the workmen to depart from the said employment of the said R. P. and G. H. P., and to break their contracts with the said R. P. and G. H. P. to force and compel the said R. P. and G. H. P. to alter and thereby increase the amount of wages which the said R. P. and G. H. P. then were in the habit of paying to the workmen in the employment of them the said R. P. and G. H. P.

On the trial, before Erle, J., at the Staffordshire Summer Assizes in this year, the defendants (except Pitt, who was acquitted) were found Guilty upon all the counts. In this Term (1)

Sir A. J. E. Cockburn, Attorney-General, *Whateley*, *Keating*, *Peacock* and *Parry* (appearing respectively for different defendants), moved in arrest of judgment:

[*678] The *counts down to the 10th inclusive charge conspiracies to force workmen to leave their employment, or the masters to alter their mode of carrying on business, by molesting, by threats, by intimidating, and by obstructing. These counts are bad, as being too vague. In the words of TINDAL, Ch. J. in *O'Connell* v. *The Queen* (2), "they do not state the illegal purpose and design of the agreement entered into by the defendants, with such proper and sufficient certainty, as to

(1) November 21st. Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) 65 R. R. 59 (11 Cl. & Fin. 155. 234).

lead to the necessary conclusion that it was an agreement to do an act in violation of the law." To "molest," as explained in Johnson's Dictionary, is only "to disturb; to trouble; to vex:" which might be done by means not unlawful, and yet produce the effects said to have been contemplated by the defendants. If the means of molestation were unlawful, the indictment should have shewn it: *Rex* v. *Seward* (1), *Rex* v. *Jones* (2). A count for conspiracy was pronounced bad on a similar ground in *Reg.* v. *Peck* (3). The word "unlawfully" does not supply the want of the essential averments: *Rex* v. *Seward* (4). Again, "threats" are not necessarily illegal threats. The defendants might merely have threatened to cease associating with the parties whom they addressed. As to "intimidating," it was the opinion of all the Judges, adopted by the House of Lords in *O'Connell* v. *The Queen* (5), that an alleged agreement to procure meetings for the unlawful purpose "of obtaining, by means of the intimidation to be thereby caused," certain objects, did not, without further averment, show an illegal purpose. TINDAL, Ch. J. said: The word "intimidation" is not a technical word; it is not *vocabulum *artis*, having a necessary [*679] meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate." A man may be intimidated by telling him that if he acts in a certain manner he will ruin his family; but this is not an unlawful menace. The same course of observation applies to "obstructing." In *Frost* v. *Lloyd* (6) it was held that to allege an obstructing of a leet jury was not enough, without stating some specific act. The allegation of inducing and persuading, in the 10th count, does not add anything material. Conspiring to persuade is no offence, unless illegal means are used.

(LORD CAMPBELL, Ch. J.: The persuading is the means, not the object.)

These objections apply also to counts 11 and 12, which allege conspiracies, by molesting and obstructing, and by threats and intimidation, to prevent workmen from hiring themselves to the

(1) 40 R. R. 406 (1 Ad. & El. 706).
(2) 4 B. & Ad. 345.
(3) 9 Ad. & El. 686.
(4) 40 R. R. 406 (1 Ad. & El. 706, 712).
(5) 65 R. R. 59 (11 Cl. & Fin. 155).
(6) 9 Q. B. 130.

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prosecutors: and, further, it ought to have been stated that the defendant knew of an intended hiring by these parties: and, again, in these counts, the names of the workmen should have been stated, or an excuse shown for omitting them: *King* v. *The Queen* (1), and an *Anonymous* (2) case there cited by PARKE, B., as having been decided at the Norwich Spring Assizes, 1845. TINDAL, Ch. J., delivering the judgment of the Exchequer Chamber in *King* v. *The Queen* (1) said: "The charge is, that the defendants below conspired to cheat and defraud divers liege subjects, being tradesmen, of their [*680] goods &c.; and the objection is that these persons should *have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name or a reason given why they are not; and, if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained."

(LORD CAMPBELL, Ch. J.: Here the workmen are not the parties to be injured: your cases are no authority for your position.)

It may be argued in defence of all these counts that they are grounded upon a statute (3) and follow its words. But that applies only where the proceeding is directly upon the statute, and alleges acts *contra formam statuti*. Here the charge itself is at common

(1) 7 Q. B. 795.

(2) 7 Q. B. 798.

(3) Stat. 6 Geo. IV. c. 129, s. 3, enacts: That, "if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman or other person hired or employed in any manufacture, trade or business, to depart from his hiring, employment or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman or other person not being hired or employed from hiring himself to, or from accepting work or employment from any person or persons;" "or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting or carrying on such manufacture, trade or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen or servants; every person so offending or aiding, abetting or assisting therein, being convicted" &c. (summarily before justices), shall be imprisoned &c. [Repealed by 34 & 35 Vict. c. 32, s. 7.]

law. And, where the proceeding is, in form, upon a statute, *it is sometimes necessary "to adopt a narrower description than what is conveyed in the literal terms of the Act:" Paley on Convictions, p. 100, 3rd ed. The rules on that subject are there stated, pp. 100 *et seq.*, and are explained by cases, among which are *Rex* v. *Ridgway* (1) and *Rex* v. *James* (2): and it is laid down, as a rule in describing the offence, "that it is not sufficient to state, as the offence, that which is only the legal result of certain facts; but the facts themselves must be specified, that the Court may judge when they amount in law to the offence." [*681]

(LORD CAMPBELL, Ch. J.: That is where the *corpus delicti* charged is the act in violation of the statute: here the *corpus delicti* is the conspiracy to do what is forbidden by the statute.)

The statute forbids doing the things only when they cannot be done so as to be lawful; and that ought to be shown by averment. *Seth Turner's* case (3) is an instance. There the information, under stat. 4 Geo. IV. c. 34, s. 3 (4), charged that S. Turner did, before the term of his *contract was completed, "absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute" &c.; and, the party having been convicted of the offence as alleged, this Court held that no offence was properly charged, because the absence was not stated to have been wilful or without lawful excuse. *Chaney* v. *Payne* (5) was decided on the same principle. The offence described by stat. 6 Geo. IV. c. 129, s. 3, depends entirely upon the [*682]

(1) 5 B. & Ald. 527.

(2) Cald. 458.

(3) 9 Q. B. 80.

(4) Stat. 4 Geo. IV. c. 34, s. 3, enacts: That if any servant in husbandry or any artificer, &c., labourer or other person, "shall contract with any person or persons whomsoever, to serve him, her or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, or otherwise respecting the same," a justice may issue his warrant to apprehend such servant &c., and may examine into the complaint; and, if it shall appear to the justice that the servant &c. "shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanour as aforesaid," such justice may commit the servant &c. to the House of Correction, &c. [Repealed by 38 & 39 Vict. c. 86, s. 17.]

(5) 1 Q. B. 712.

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means used; and, if those are not properly described, there is no sufficient charge of conspiracy to violate the statute.

The 13th, 14th and 15th counts state that workmen had contracted to serve the prosecutors for certain times &c., and had entered their service, and that the defendants conspired by divers subtle means and devices to induce and persuade them unlawfully to absent themselves from the service of the prosecutors without their consent before the terms of their contracts were completed. The workmen could not have been convicted of an offence under stat. 4 Geo. IV. c. 34, s. 3, in absenting themselves, unless the contract was averred to have been in writing: *Lindsay* v. *Leigh* (1). And, to charge the present defendants effectually, the counts ought to have stated in terms what the contract was; and that, under such contract, the workmen had entered the service; and that the contract was made after the passing of the Act. It should also have been stated that the absence was for some given time, and without lawful excuse.

(LORD CAMPBELL, Ch. J.: If the conspiring was well laid, it would
[*683] be of no consequence to show *what the absence in fact was.)

Again (as was contended with reference to the 10th count), conspiring merely to "induce and persuade" is no offence, even if a contract appeared which made it unlawful not to serve.

(LORD CAMPBELL, Ch. J.: It is said that they conspired to induce "by divers subtle means and devices:" are not these terms of art?)

Such terms were used in one count of the indictment in *Rex* v. *Biers* (2); yet the judgment was arrested.

(LORD CAMPBELL, Ch. J.: The objection there was rather to the generality of the object, as alleged, than of the means. Perhaps the count might not have been maintainable, however specifically the means had been set out.)

Rex v. *Richardson* (3) seems to show that it would. In *Rex* v. *Seward* (4) TAUNTON, J. said that "merely persuading" paupers to contract matrimony was "not an offence. If, indeed, it were done by unfair and undue means, it might be unlawful; but that is not

(1) 11 Q. B. 455.
(2) 40 R. R. 304 (1 Ad. & El. 327).
(3) 1 Moo. & Rob. 402.
(4) 40 R. R. 406 (1 Ad. & El. 715).

stated." In *Reg.* v. *Daniell* (1) HOLT, Ch. J. thought that merely enticing an apprentice to leave his master was not an indictable offence. *Reg.* v. *Collingwood* (2) is to the same point. The Combination Act, 39 & 40 Geo. III. c. 106, s. 3, made it an offence to persuade, solicit or influence the workman. Stat. 6 Geo. IV. c. 129, s. 2, repeals that clause; sect. 3 re-enacts some of the former prohibitions, and introduces others, but does not revive this. If the persuasion by one person would not be an indictable offence, such an act cannot be made so by joining several in the indictment as conspirators: **Rex* v. *Pywell* (3), *Rex* v. *Turner* (4). [*684]

(ERLE, J.: There is a later case in which these were much considered (5).)

There the indictment expressly alleged fraud and false pretences. The charge of intoxicating, in counts 14, 15 and 18, is not so framed that the Court can give any sensible construction to it: a man does not "intoxicate" another.

(COLERIDGE, J.: It has been held of late here that the Courts have more common sense than some of the old decisions give them credit for. We have considered that such expressions as "Frozen Snake" and "Man Friday" may be understood by us as a person out of Court understands them (6). A person out of Court would understand what was meant by a man intoxicating another.

LORD CAMPBELL, Ch. J.: And intoxicating is not laid as the *corpus delicti*.)

Counts 16 to 18, inclusive, are too vague, and are open to the objections already made as to "intimidating," "intoxicating" and "inducing." To "entice and seduce away" workmen, as charged in count 19, is no offence, according to *Reg.* v. *Daniell* (7).

(LORD CAMPBELL, Ch. J.: The count charges a conspiring to do it.)

The 20th count is merely cumulative, summing up the various

(1) 6 Mod. 99; *S. C.* 1 Salk. 380. See *Rex* v. *Higgins*, 6 R. R. 358 (2 East, 4); *Reg.* v. *F. O'Connor*, 5 Q. B. 16, 26.
(2) 2 Ld. Ray. 1116.
(3) 1 Stark, N. P. C. 402.
(4) 13 East, 228.
(5) See *Reg.* v. *Kenrick*, 5 Q. B. 49.
(6) See *Hoare* v. *Silverlock*, 76 R. R. 379 (12 Q. B. 624).
(7) 6 Mod. 99.

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means previously alleged, and which, taken singly, are not matters of criminal charge.

(LORD CAMPBELL, Ch. J.: The charge is that the defendants conspired, by those means, to force and compel the prosecutors to increase the amount of wages which they were in the habit of paying to their workmen.)

Counsel then moved for a new trial on the grounds of misdirection [*685] (see p. 627, note (2), *post*): and that there *was no evidence for the jury against some of the defendants.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now said:

The Judges who are present (1), and my brother COLERIDGE, with whom we have consulted, are all agreed on the subject of this motion. As to the motion for a new trial, we think there is no ground for it except in the cases of *Rowlands* and *Winters*, against whom there was some evidence, but my brother ERLE would have been more satisfied if the verdict had been in their favour. If a rule *nisi* is granted as to them, it must be for a new trial as to all who have been convicted (2): but it will perhaps be thought, on the part of the Crown, that the ends of justice are satisfied if a *nolle prosequi* be entered as to these defendants, and the verdict stand as to the rest. With respect to the indictment, we all agree in thinking that the 16th, 17th and 19th counts are open to objection as being too vague. We give no final opinion: but on these counts there will be a rule *nisi* to arrest the judgment, unless a *nolle prosequi* be entered.

Allen, Serjt., for the Crown, consented to enter a *nolle prosequi* as to all the defendants on the 16th, 17th and 19th counts, and on the indictment generally as to Rowlands and Winters.

LORD CAMPBELL, Ch. J.:

That being so, no rule will be granted. We think that there was no misdirection, and that there was ample evidence, except [*686] against Rowlands *and Winters. Then, as to the record: a *nolle prosequi* is entered on the 16th, 17th and 19th counts; and the others are wholly unexceptionable. It is objected that some counts

(1) Lord CAMPBELL, Ch. J., PATTESON and ERLE, JJ.

(2) See *Reg.* v. *Gompertz*, 72 R. R. 458 (9 Q. B. 824, 842).

do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect: but this is quite unnecessary. The words of the Legislature are used; the terms in question have a meaning stamped upon them by the Act, 6 Geo. IV. c. 129, s. 3; and we must take it that they are used here in that sense. And they are not employed as describing the substantive offence for which the indictment is preferred: that offence consists in the conspiracy, which is a misdemeanour at common law. I have looked most elaborately into all the authorities which were cited: and as to *Turner's* case (1) I have no doubt whatever that it was wrongly decided. Going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct or prevent them, would in itself be an indictable offence; and the conspiring to commit such an offence must be an indictable conspiracy.

Per CURIAM:

Rule refused (2).

Sentence of three months' imprisonment was then passed. *Parry*

(1) *Rex* v. *Turner*, 13 East, 228.

(2) One ground of the motion for new trial was that ERLE, J., in summing up, had directed the jury as follows.

The law is clear, that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know, there is no objection, in point of law, to it; and it is not necessary to go into that matter: but I consider the law to be clear so far, only, as while the purpose of the combination is to obtain a benefit for the parties who combine; a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different *nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another.

The rights of workmen are conceded: but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage.

His Lordship then said that, in this case, upon undisputed evidence, there had been a combination to force Messrs. Perry to agree to an uniform book of prices: That, upon the facts before the jury, they would have to give their opinion upon three classes of counts, charging conspiracies: 1. To prevent workmen from working for the prosecutors, by intimidating the workmen; 2. To force the assent of the prosecutors to certain alterations, by intimidating the prosecutors; 3. To induce workmen to leave the prosecutors' employment, contrary to their contract: and he stated that if the jury thought these counts sustained

[*687, *n.*]

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asked of the Court that the defendants *might be placed in the rank of first class misdemeanants.

Lord CAMPBELL, Ch. J. asked if the Court had any authority to make this order; and, none being pointed out, he said: We sentence to imprisonment merely (1).

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

1851. *May* 14. *June* 19. *Nov.* 26.

HENDERSON *v.* EASON (2).

(17 Q. B. 701—722; S. C. 21 L. J. Q. B. 82; 16 Jur. 518.)

[701]

Held, by the Court of Exchequer Chamber on bill of exceptions:

That, if there be tenants in common, and one tenant alone occupy the property, he is answerable as bailiff to his co-tenant in an action of account, under stat. 4 Ann. c. 16, s. 27, if he receive more than comes to his just share, but not otherwise.

And he is answerable only for what he receives more than comes to his just share.

He receives more than comes to his just share, within the meaning of the statute, if he receives money or something else, given or paid by another, which the co-tenants are entitled to simply by their being tenants in common, and if the amount which he so receives and keeps is more than in proportion to his interest as such tenant.

He does not receive more than comes to his just share within the statute if he merely has the sole enjoyment of the property, even though by the

by the evidence, they should convict upon them. He then added:

But, supposing any of the defendants are acquitted as to all those classes, and you should still be of opinion that a combination existed for the purpose of obstructing Messrs. Perry in carrying on their business, and forcing them to consent to this book of prices, and, in pursuance of that concert, they persuaded the free men and gave money to the free men to leave the employ of Messrs. Perry, the purpose being to obstruct them in their manufacture and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, I am of opinion that that would also be a violation of the law, and warrant a conviction upon the counts directed against that form of offence.

It was contended, on behalf of the defendants, that this language of the learned Judge led the jury to suppose that, although the combination were for a legitimate object, yet, if means to be used would have the effect of obstructing the prosecutors in carrying on their business, it was an indictable conspiracy; whereas, if the object of the workmen was to enforce their own rights, they were justified in combining to do so, though the effect were an obstruction of the prosecutors' business. But the learned Judge stated that his words had no such meaning; and the COURT saw no objection to the summing up.

(1) See stat. 5 & 6 Vict. c. 22, s. 17; *Cobbett* v. *Grey*, 4 Ex. 729; *Gregory* v. *The Queen*, 15 Q. B. 957.

(2) Cited, *Hill* v. *Hickin* [1897] 2 Ch. 579, 66 L. J. Ch. 717, 77 L. T. 127.

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employment of his own industry and capital he makes a profit by the enjoyment, and takes the whole of the profit.

Therefore, in an action of account, proof of enjoyment and receipt of the whole profits is not evidence of the occupying co-tenant being bailiff within the meaning of the statute, nor presumptive evidence of his having received more than came to his just share.

ACCOUNT. The declaration stated: That heretofore, and in the lifetime of the said Edward Eason, viz. on 18th November, 1833, and from thence continually for a long time in the lifetime of E. E., viz. until and upon 18th November, 1839, on which last mentioned day E. E. died, the plaintiff and E. E. were seised in their demesne as of fee as tenants in common of and in certain messuages, lands and hereditaments, consisting of divers, to wit, twenty messuages, twenty cottages &c., one hundred acres of meadow land &c., with the appurtenances, *situate &c. in the several parishes of Saint [*702] John the Baptist and Saint Peter the Apostle, in the Isle of Thanet in the county of Kent: that is to say, the plaintiff during the time aforesaid was seised in his demesne as of fee of and in one undivided half part or moiety thereof, and the said E. E. in his lifetime during the time aforesaid was seised in his demesne as of fee of and in the other undivided half part or moiety thereof: and the said E. E. in his lifetime during all the time aforesaid had the care and management of the whole of the said messuages, lands and hereditaments with the appurtenances aforesaid, to receive and take the rents and profits thereof to the common profit of the plaintiff and the said E. E. deceased, and, as bailiff of the plaintiff of what he the said E. E. received more than (1) his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when the said E. E. should be thereunto afterwards requested so to do, according to the form of the statute in such case &c. Averment: That E. E. in his lifetime, during the time aforesaid, received more than his just share and proportion of the rents, issues and profits of the tenements aforesaid with the appurtenances, and the plaintiff's share thereof, that is to say the whole of the rents, issues and profits of the said tenements with the appurtenances, amounting to a large sum of money, viz. 2,000*l.*; and that the said E. E. deceased did not nor would at any time in or during his lifetime render a reasonable account to plaintiff of the said rents, issues and profits by him the said E. E. so *received as [*703]

(1) PARKE, B. observed that the count, here, did not exactly follow the words of stat. 4 Ann. c. 16, s. 27, "more than comes to his just share." The parties agreed that this should be amended.

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aforesaid, or of either of them or any part thereof, or of the said share of the plaintiff of and in the same for the time aforesaid or any part thereof, but wholly neglected and refused so to do: And, although, afterwards and after the death of E. E., viz. on 1st May, A.D. 1840, defendant as such executor as aforesaid was requested by plaintiff to render a reasonable account to plaintiff of the said rents, issues and profits by the said E. E. so received as aforesaid, and the plaintiff's said share thereof, and although a reasonable time has elapsed since such request made as aforesaid and before the commencement of this suit, yet defendant, as such executor as aforesaid, has not at any time rendered a reasonable account to plaintiff of the said rents, &c. by the said E. E. deceased so received &c., or any part thereof, or of the said share &c. or any part thereof, but so to do the defendant as such executor as aforesaid wholly neglected and refused, contrary to the form of the statute &c., and to the damage of plaintiff &c.

Pleas. 1. That E. E. had not in his lifetime the care and management of the whole of the said messuages, lands and hereditaments with the appurtenances, to receive and take the rents, issues and profits thereof to the common profit of plaintiff and of the said E. E. deceased, and, as bailiff of the plaintiff of what he the said E. E. received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when he the said E. E. should be thereunto requested, according to the form of the statute in such case &c., in manner and form &c. Conclusion to the country.

2. That E. E. did not in his lifetime receive more than his just
[*704] share and proportion of the rents, issues *and profits of the said tenements with the appurtenances, in manner and form &c. Conclusion to the country.

Issues were joined on both pleas.

On the trial, before Coleridge, J., at the London sittings in Hilary Term, 1850, a verdict was found for the plaintiff on both issues, the defendant's counsel tendering a bill of exceptions.

Judgment was entered up: That the defendant, as such executor as aforesaid, account with the plaintiff of the time aforesaid in which the said E. E. was bailiff of the plaintiff and had the care and management of the aforesaid messuages, lands, &c., to receive and take &c. to the common profit of the plaintiff and the said E. E.: and an account was afterwards taken and declared by auditors assigned by the COURT, namely by two of the Masters, who found,

and reported and certified under their hands and seals, that the sum of 900*l.* was due to the plaintiff from the defendant as executor &c.: wherefore it was considered that plaintiff should recover from defendant, as executor, the 900*l.*, and costs &c.

The defendant brought error in the Exchequer Chamber. By the bill of exceptions, annexed to the writ of error, it was stated:

That, upon the trial of the said issues, the counsel for the plaintiff proved that the plaintiff and Edward Eason were, from 18th November, 1833, to 18th November, 1838, seised in their demesne as of fee as tenants in common of and in the hereditaments in the declaration mentioned; and that those hereditaments consisted of a certain farm called Nash Farm, that is to say a certain messuage and outbuildings, and about 133 acres of land; and that E. E. during all the time aforesaid occupied the whole of the said farm on his own account, and that *plaintiff did not at any time during [*705] the time aforesaid occupy any part of the said farm, and the said E. E. cultivated the same on his own account solely, and appropriated the produce thereof to his own use; that the farm was cropped in the usual way by the said E. E.; and that the said E. E. kept the usual quantity of live and dead stock, and farmed the land well, and that he received all the produce of the farm and sold it on his own account; and that the farm was of the value of 300*l.* a year to let. And thereupon counsel for plaintiff insisted that the facts so proved were conclusive that E. E. had in his lifetime the care and management of the whole &c. to receive &c., and, as bailiff &c., to render &c. (as in the declaration and 1st plea), in manner and form in the declaration alleged: And also that the said facts so proved were presumptive evidence that the said E. E. did in his lifetime receive more than his just share and proportion of the rents, issues and profits of the said tenements &c. in manner and form &c.: That counsel for defendant insisted that the matters so proved were not so conclusive to the effect and in manner insisted on by counsel for the plaintiff: And the Judge declared his opinion to the jury that the said matters &c. so proved &c. were respectively conclusive and presumptive evidence to the effect and in manner insisted on by counsel for the plaintiff, and then directed the said jury, if they believed the said matters and things so proved and given in evidence, to find a verdict for the plaintiff upon each of the said issues, and with this statement and direction left the case to the jury. To which statement and direction of the Judge the counsel for defendant excepted.

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And counsel for defendant then argued and contended *before the Judge that a tenant in common of lands was not, by reason of the mere occupation by him of those lands, and by reason of the receipt of the whole of the produce of the said farm, and the sale of the said produce on his own account, liable in an action of account to his co-tenant in common: which said argument and contention the said Judge then overruled, and directed the jury that the said Edward Henderson (defendant) was, by reason of such occupation as aforesaid of the said farm by the said E. E., and by reason of the receipt by E. E. of the whole produce of the said farm, and the sale of the said produce on his own account, in the absence of any evidence to the contrary, liable to the said plaintiff in an action of account. To which &c.: exception, as before.

And the said counsel &c.: further argument for defendant, That the mere occupation of lands by a tenant in common of them, and the receipt by the said tenant in common of the whole of the produce of the said lands, and the sale by him of the said produce on his own account, did not, as a matter of law, constitute him bailiff of his cotenant in common of those lands of what he received beyond his just share: which argument the Judge overruled, and directed the jury that such occupation as aforesaid by the said E. E., and the receipt by him the said E. E. of the whole of the produce of the said lands, and the sale by him of the said produce on his own account, did as a matter of law constitute him bailiff of the said plaintiff of what he received beyond his just share. To which &c.: exception as before.

The grounds of error specially assigned were the rulings stated, as above, in the bill of exceptions. Joinder in error.

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The writ of error was argued in Easter vacation, May 14th, 1851, before Maule and Williams, JJ. and Parke, Platt and Martin, Barons: and in Trinity vacation, June 19th, 1851, before Maule, Cresswell and Williams, JJ., and Parke, Alderson and Martin, Barons.

W. H. Watson, for the plaintiff in error, defendant below:

The question turns upon the meaning of stat. 4 Ann. c. 16, s. 27, which enacts, among other things, that an action of account may be brought by one tenant in common or his executor against the other tenant in common or his executor, as bailiff, for receiving more than comes to his just share or proportion. It was held by the Court of Queen's Bench (1) that, under this statute, the mere

(1) *Eason* v. *Henderson*, 12 Q. B. 986.

occupation of the land by one only of the two tenants in common made him the bailiff of the other; and that it was not necessary, in order to make the tenant in common who so occupied liable, as bailiff of the other, to an action of account, that he should have actually received any surplus profit, inasmuch as, *primâ facie*, the whole profits must be taken to be more than his just proportion. This construction of the statute is incorrect. It is clear that before stat. 4 Ann. c. 16, the occupying tenant in common was not liable to an action of account as bailiff of the other tenant in common, unless he had been expressly appointed bailiff. In Co. Litt. 172 a, it is said: "If there be two joint tenants or tenants in common of lands, and the one make the other his bailiff of his moiety, he shall have an action of account against him as bailiff: and so are the books to be intended, that speak of an action of account in that *case." And again, 200 b: "But although one tenant in common [*708] or joint tenant without being made bailiff take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common, or joint tenant, against another, must be intended when the one maketh the other his bailiff, for otherwise Never his bailiff to render an account is a good plea." Stat. 4 Ann. c. 16, does away with the necessity of any express appointment as bailiff, and provides that the occupying tenant in common shall be liable to an action of account as bailiff of the other merely for receiving more than his just share and proportion. But all the cases upon that statute decide that the declaration must state that the occupying tenant in common has actually received more than his just share and proportion; and that he is not liable as bailiff unless he has received such surplus: *Wheeler* v. *Horne* (1), *Sturton* v. *Richardson* (2). Were this not so, a verdict might be found for the plaintiff in an action upon the statute and a judgment "*quòd computet*" recorded, and yet, on going before the auditors, it might turn out that the occupying tenant in common had even been a loser by his occupation.

(MARTIN, B.: Here there is an express averment that he had received more than his share.)

(1) Willes, 208.

(2) 13 M. & W. 17.

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That was not proved at the trial.

(PARKE, B.: You say that he is not liable as bailiff if he has received no profit at all, or if he has received no more than his share.)

[*709] That is the intention *of the statute. If it were not necessary for the plaintiff, before obtaining any judgment, to show that the defendant had received more than his share, the auditors themselves would have to enter into a calculation of the expenditure and receipts attendant upon the occupation.

(MAULE, J.: The same difficulty arises where the defendant is sued as bailiff at common law.)

In that case the plaintiff has a right to bring an action of account for what the defendant might have received as bailiff: under the statute the tenant in common who occupies is not bailiff at all unless he has also actually received more than his share of the profits of such occupation.

(MAULE, J.: Sect. 27 first provides generally that actions of account may be brought against the executors and administrators of guardians, bailiffs and receivers; and then the particular provision follows as to joint tenants and tenants in common. That looks as if the words "for receiving more than comes to his just share or proportion" were intended to qualify the previous general provision in that particular instance, in the manner you suggest.)

No doubt that was the object; and therefore, in an action founded upon that particular provision of sect. 27, the averment that defendant has received more than his just share must be made and proved in order to entitle the plaintiff to a verdict, although it would not be necessary in an action of account against an ordinary bailiff, guardian or receiver.

(PARKE, B.: Suppose there is a loss upon the crops planted by the tenant in common who occupies: is the other tenant in common to contribute? And, if he does not, is he entitled to half the profits, when there are any?)

[*710] In a former stage of the present case the VICE-CHANCELLOR *OF

ENGLAND thought that the tenant in common who occupied was bound to account for the rent (1).

(MARTIN, B.: Suppose he occupies only one half of the land; is he liable to account?)

Not in that case.

(MAULE, J.: According to your argument, he is bound to account even then, if he has received more than his share of the profits arising from that half. It would be a sort of summary mode of partition.

WILLIAMS, J.: Suppose each occupies one of two houses: is each bound to account to the other?)

If each received the rent arising from one of two houses, neither would have to account to the other; each would receive his share.

(MAULE, J.: That is not so: each is entitled to the half of the whole. If there were a hundred houses, each producing a shilling rent, and there were a hundred tenants in common, each of whom was the landlord of one house, then each would have to account to the other ninety-nine in respect of the shilling received by him.

PARKE, B.: In Chancery, the tenant in common who received the rent would certainly be liable to account to the other.)

He would have to account only if anything had been actually received: *M'Mahon* v. *Burchell* (2).

(MAULE, J.: The real question seems to be, whether stat. 4 Ann. c. 16, imposes upon the occupying tenant in common the necessity of being bailiff to the other who does not occupy?

PARKE, B.: It is very hard if the one who does not occupy, and who is at no expense or risk, is to claim, as a matter of course, his share of the profits, though he does not contribute to the loss.

MAULE, J.: At all events *stat. 4 Ann. c. 16, does not allow him to do so unless the other has received more than his share of the profits. If the occupying tenant in common is liable to account, [*711]

(1) *Henderson* v. *Eason*, 15 Sim. 303.

(2) 64 R. R. 211 (1 Coop. temp. Cott. 457; *S. C.* 2 Ph. 127).

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whether he has received more than his share or not, he must either be bailiff to the other or abandon the occupation.)

That would be the result of the construction argued for on the other side, which Lord COTTENHAM, in *M'Mahon* v. *Burchell* (1), decides to be incorrect.

(MAULE, J.: The argument on the other side must be that, if one of the tenants in common receives all the profits arising from one half, in which case he would have received more than his share of that half, he is accountable to the other tenant in common.)

The tenant in common who does not occupy has no right to say, as a matter of course, that he is entitled to any part.

(PARKE, B.: I certainly doubt whether he can claim any part of the *fructus industriales*. If he allows the other to occupy and exercise all right over the land, can he afterwards claim any part of that which is the result of the labour and capital of that other?)

Channell, Serjt., for the defendant in error (plaintiff below):

The LORD CHANCELLOR directed this action to be brought, not because he dissented from the judgment below, but because the parties had raised the question in a form which did not admit of review by a court of error (2). The ruling of COLERIDGE, J. at Nisi Prius was conformable to the decision in the Queen's Bench, and is correct. Stat. 4 Ann. c. 16, s. 27, on which the present action is founded, does not introduce any new description of the circumstances under which a person *shall be responsible as bailiff; but it extends the former remedy to persons who were not liable to the action before, making one co-tenant accountable to the other by virtue of that relation, when he has occupied the property, though he was not appointed bailiff. When the relation is established, the co-tenant is entitled, conclusively, to judgment *quòd computet*: but the judgment is interlocutory only: it has been doubted whether *scire facias* lay upon it: 1 Bac. Abr. 45 (7th ed.), tit. Accompt (G). That judgment is to be followed up by an inquiry before the auditors: "and the auditors appointed by the Court, where such action shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters

[*712]

(1) 64 R. R. 211 (2 Ph. 127, 134).

(2) See *Eason* v. *Henderson*, 12 Q. B. 997, note (*a*).

in question, and for their pains and trouble in auditing and taking such account, have such allowance as the Court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be:" stat. 4 Ann. c. 16, s. 27.

(CRESSWELL, J.: What is the "balance of the account" here?

MAULE, J.: It seems hard that the party for whom the finding is should pay the costs, unless he is in some way recouped.)

At common law the accountability by virtue of the appointment as bailiff warranted a judgment *quòd computet*; the statute of Anne does not alter this state of things, except by dispensing with an express appointment. The enactment stands in place of an actual nomination as bailiff: note (8) to Harg. Co. Litt. 172 a. As PATTESON, J. said in *Eason* v. *Henderson* (1), "It seems intended that, by the mere relation of tenant in common, the one party should be entitled to treat the occupier as bailiff." **Wheeler* v. *Horne* (2) was a different case from this: there the declaration charged, generally, "that the defendant was bailiff of the plaintiff:" and WILLES, Ch. J. observed: "As this is a general statute, it was not necessary to set it forth or refer to it: but the plaintiff should have set forth so much as to bring his case within the statute; and it is material that in the present case the defendant has pleaded that he was not bailiff to the plaintiff." The plaintiff, therefore, had to establish his case as at common law. [*713]

(PARKE, B.: WILLES, Ch. J. says that "declarations since the statute have always set forth" "that the defendant has received more than his share.")

Sturton v. *Richardson* (3) was decided on the same ground, on the direct authority of *Wheeler* v. *Horne* (2), and upon demurrer to the declaration. But, in the present case, the question is, whether the plaintiff has or has not proved the substance of the issue, according to the intention of the statute.

The defendant, then, was conclusively shown to be bailiff in this case; and, when it was proved that he had occupied the whole farm on his own account, farmed it in the usual manner, and appropriated all the produce to his own use, there was presumptive

(1) 12 Q. B. 993.
(2) Willes, 208
(3) 13 M. & W. 17.

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evidence that he had received more than came to his share, though the contrary might have been shown before auditors on a *quod computet.*

(CRESSWELL, J.: The learned Judge at Nisi Prius makes this evidence conclusive upon the first issue. But, if the co-tenant has received nothing, is he, under these circumstances, conclusively made a bailiff for the purpose of accounting?

MAULE, J.: Suppose he left the land uncultivated.

CRESSWELL, J.: Or cultivated at a loss.)

[*714] The mere relation, coupled with the occupation *of the entire property, makes him a bailiff within the statute.

(MAULE, J.: Suppose there are co-tenants of a house; one does not choose to occupy, the other does. Is the occupier to pay rent to the absent co-tenant?)

The facts might be a defence before the auditors.

(MAULE, J.: One question is, whether the receipt, to be the subject of this account, must not be of money; something which can actually be measured by number.)

Account lies for chattels.

(MAULE, J.: That is for the value of the chattels, as stated in the declaration.

PARKE, B.: I think it is a grave doubt whether the action lies for any but receipts from a third person. Suppose a co-tenant plants a very precarious crop, as hops; is he liable if he makes a gain, when he could not claim contribution on loss?)

That would be a matter of defence before the auditors, in the particular case. The statute makes the relation of co-tenant tantamount to an appointment; and thence results the right to have an account. The enactment, that account shall lie for one tenant in common against the other "as bailiff for receiving more than comes to his just share," may perhaps be read "as bailiff" "and liable for what he receives more than his just share." Before the statute he was not liable for this, unless expressly appointed; now he is liable, without such appointment, to the same extent as an

appointed bailiff was before. It is not necessary to contend for the provision denied by Lord COTTENHAM in *M'Mahon* v. *Burchell* (1), that mere possession renders the co-tenant liable for rent: it is enough to say that possession, under the present circumstances, warranted the judgment *quòd computet*.

Cleasby (in the absence of *Watson*), in reply:

The *learned Judge's direction on the first issue in this case was, [*715] that the occupying, and receiving the whole produce, showed conclusively that the co-tenant occupied for the common profit, and as bailiff for what he received more than came to his share. The plaintiff in error contends that, to warrant a judgment *quòd computet*, there should have been a receipt proved of something which the other tenant was entitled to share in. Whether the statute of Anne imposed upon the co-tenant any other than the original liability, it is not necessary to enquire. It does not make the occupying tenant liable as bailiff for the profits produced by his capital and cultivation, however expensive and at whatever hazard bestowed.

(ALDERSON, B.: I do not see how an occupation can be shared in the way of account: money may.)

Each of two tenants in common is entitled to occupy: the one who chooses to occupy cannot compel the other to do so; neither can the other compel him to render an account in respect of his occupation. The only apportionment practicable is a partition. The word "receiving" is an important one in sect. 27 of stat. 4 Ann. c. 16. The cotenant is liable as bailiff "for receiving more than comes to his just share." He must be a receiver, and of something, specifically, whereof he is not entitled to keep the whole. There must be a "share" before he can be bailiff.

(MARTIN, B.: In a case in Skinner, *Anonymous* in Chancery (2), it is said by Lord Keeper NORTH, that, if, of "our tenants in common of land, one or more stock the land, and manage it, the rest shall have an account of the profits; but if a loss come, as if the sheep, &c. die, they shall bear a part.")

That is a mere *dictum*.

(PARKE, B.: As a general proposition it *cannot have been law [*716]

(1) 64 R. R. 211 (2 Ph. 134).

(2) Skinn. 230.

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before the statute of Anne; but by the context it seems to be grounded upon a supposed consent (1).)

The statute cannot refer to a mere use of the common property, however advantageous.

(MAULE, J.: It might be reasonable that a fair rent should be assessed. But that could hardly be worked out. The principle of justice in the common law is that there is no wrong without a remedy: but in the case of occupation by one co-tenant, without an ouster, there is not a wrong.

PARKE, B.: In an *Anonymous* (2) case in Cary's Reports it is said: "Two joint tenants, the one takes the whole profits, no remedy for the other, except it were done by agreement, or promise of account." The agreement must be to a carrying on of the management at a joint profit and loss.)

If the occupying tenant has received payment from debtors to the estate, and given them discharges, he may be accountable under the statute as a bailiff: the mere lawful use of the property does not make him liable: for such use there is no remedy; for it is not a wrong. The materiality of an actual receipt is clear from *Wheeler* v. *Horne* (3).

(WILLIAMS, J. mentioned *Walker* v. *Holyday* (4).)

Cur. adv. vult.

PARKE, B. now delivered the judgment of the COURT:

This case was heard before us at the sittings after last Trinity Term. It is an action of account founded on the statute 4 Ann. c. 16, by Robert Eason against the executor of his co-tenant in
[*717] common Edward Eason. *The declaration states: (His Lordship here stated the substance of the count, set forth, *ante*, p. 629.) There is an averment that Eason in his lifetime received more than his just share and proportion of the rents, issues and profits of the said tenancy, that is to say the whole of the rents, issues and profits, and had not rendered an account to the plaintiff.

(1) See, as to the *Anonymous* case in Skinner, *S. C.*, as *Strelly* v. *Winson*, 1 Vern. 297, and note (1) *ib.*, 3rd ed., and *Horn* v. *Gilpin*, Amb. 255. Also 20 Vin. Abr. 335 *et seq.*, tit. Trade and Navigation (A); and Abbott on Shipping, 99 *et seq.*, 8th ed.

(2) Cary, 29; ed. 1820.

(3) Willes, 208.

(4) Comyns's Rep. 272.

There were two pleas to the declaration: (His Lordship stated the pleas, as set forth, *antè*, p. 630.)

Issue being joined on these pleas, evidence was given that the two Easons were tenants in common in fee of a messuage and farm of above 133 acres of land from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account, the plaintiff occupying no part: that he cultivated the same on his own account solely, and appropriated the produce to his own use; and that he cropped the farm in the usual way, kept the usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account.

On the trial, before our brother Coleridge, the plaintiff's counsel insisted that this evidence was conclusive on the first issue, and presumptive evidence on the last, in favour of the plaintiff: and so the learned Judge held, in compliance with the ruling of the Court of Queen's Bench on a special case between the same parties, reported in 12 Queen's Bench Reports, 986 (1).

That case was stated by leave of a Judge, in an action brought by order of the late LORD CHANCELLOR. The LORD CHANCELLOR, we are told, was dissatisfied with that proceeding for certain reasons wholly immaterial to *be inquired into by us, and directed this action [*718] to be brought, in which the important question between the parties is to be settled.

There is no doubt as to the law before the statute of 4 Ann. c. 16. If one tenant in common occupied, and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.

Until the statute of Anne this state of the law continued. That statute provides, by section 27, that an action of account may be brought and maintained by one joint tenant and tenant in common, his executors and administrators, against the other, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common; and the auditors are authorized to administer an oath.

Declarations framed on this statute vary from those at common

(1) *Eason* v. *Henderson*, 12 Q. B. 986.

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law, as it is an essential averment in them that the defendant has received more than his share. This was held in the case of *Wheeler* v. *Horne* (1), and in *Sturton* v. *Richardson* (2).

Under the statute of Anne he is bailiff only by virtue of his receiving more than his just share, and as soon as he does so, and is answerable only for so much as he actually receives, as is fully explained by Lord Chief Justice WILLES in the case above cited.

[*719] He is not *responsible, as a bailiff at common law, for what he might have made without his wilful default.

It is to be observed that the statute does not mention lands or tenements, or any particular subject. Every case in which a tenant in common receives more than his share is within the statute; and account will lie when he does receive, but not otherwise. It is to be observed, also, that the receipt of issues and profits is not mentioned, but simply the receipt of more than comes to his just share; and, further, he is to account when he receives, not takes, more than comes to his just share. What, then, is a "receiving" of more than comes to his just share, within the meaning of that provision in the statute of Anne?

It appears to us that, construing the Act according to the ordinary meaning of the words, this provision of the statute was meant to apply only to cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion.

The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.

[720] But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter.

(1) Willes, 208 (2) 13 M. & W. 17.

There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling-house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one co-tenant in common, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his co-tenants for that occupation or use to which to the full extent to which he enjoyed it he had a perfect right. It appears impossible to hold that such a case could be within the statute; and an opinion to that effect was expressed by Lord COTTENHAM in *M'Mahon* v. *Burchell* (1). Such cases are clearly out of the operation of the statute.

Again, there are many cases where profits are made, and are actually taken, by one co-tenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceed the *value of [*721] the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the co-tenants? The risk of the cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all that produce he cannot be said to receive more than his just share and proportion to which he is entitled as a tenant in common. He receives in truth the return for his own labour and capital, to which his co-tenant has no right.

In the case before Lord North in Skinner (2), in which it is said

(1) 64 R. R. 211 (2 Ph. 134).

(2) *Anonymous* in Chancery, Skinn. 230. See p. 640, note (1), *ante*.

HENDERSON v. EASON.

that, if one of four tenants in common stock land and manage it, the rest shall have an account of the profits, but if a loss come, as of the sheep, they shall bear a part, it is evident, from the context, Lord NORTH is speaking of a case where one tenant in common manages by the mutual agreement of all for their common benefit; for he gives it as an illustration of the rights of a part owner of a ship to an account when the voyage is undertaken by his consent, expressed or implied.

[*722] Where the natural produce of the land is augmented *by the capital and industry of the tenant, grass, for instance, by manuring and draining, and the tenant takes and sells it, or where, by feeding it with his cattle, he makes a profit by it, the case seems to us to be neither within the words or spirit of the Act, though there are not cases of *fructus industriales* in either case.

It may be observed, however, that the evidence stated in the bill of exceptions does not raise either of these points.

We therefore think that, upon the evidence set out in this case, there was nothing to warrant the jury in coming to the conclusion that the defendant received more than his just share within the meaning of the Act; and that the direction of the learned Judge as to the second issue was therefore wrong. And we also think that there was no conclusive or sufficient, or indeed any, evidence that he had the care and management of the farm for their common profit, as averred in the declaration. We therefore think that there should be

Judgment to reverse the judgment of Q. B., and for a venire de novo.

IN THE QUEEN'S BENCH.

DOE D. NEWMAN *v.* RUSHAM (1).

1851. *May* 28. 1852. *Jan.* 13.

(17 Q. B. 723—736; S. C. 21 L. J. Q. B. 139; 16 Jur. 359.)

A purchaser from the devisee of one who had made a voluntary conveyance in his lifetime is not entitled, under stat. 27 Eliz. c. 4, to avoid the voluntary conveyance (2).

[723]

EJECTMENT. On the trial, before Martin, B., at the Wiltshire Spring Assizes, 1851, the verdict passed for the plaintiff, subject to leave to move to enter a verdict for the defendant.

(1) Cited, *Godfrey* v. *Poole* (1888) 13 App. Cas. 504, 57 L. J. P. C. 78.—A. C.

(2) See now Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).—A. C.

Crowder, in the ensuing Term, obtained a rule *nisi* accordingly, against which, in Trinity Term, 1851, *Montague Smith* showed cause (1); and *Crowder* and **Barstow* were heard in support of the rule. The facts and arguments are so fully stated in the judgment as to render any more detailed report unnecessary. [*724]

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered the judgment of the COURT:

The facts appear to be as follows.

John Newman, being seised in fee, by deed, 3rd July, 1833, covenanted to stand seised to himself for life, remainder to Sarah Newman (his daughter-in-law) for life, remainder to George Newman (his grandson), the lessor of the plaintiff, in fee. On 16th March, 1844, John Newman made his will, and devised the premises to Sarah Newman for life, remainder to Thomas Morse in fee.

John Newman was buried on 19th March, 1844. On the 5th April, 1847, Sarah Newman and Thomas Morse sold and conveyed the premises to the defendant for 100*l*. Sarah Newman died on 2nd May, 1849.

A verdict was found for the plaintiff; and a rule *nisi* has been obtained to enter a verdict for the defendant.

The deed of John Newman is admitted to be voluntary: and the question is, whether the defendant is such a purchaser, within stat. 27 Eliz. c. 4, as to be entitled to treat that deed as fraudulent and void.

The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he *conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers even when they have had notice of them: *Doe* d. *Otley* v. *Manning* (2). Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the [*725]

(1) 28th May. Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) 9 R. R. 503 (9 East, 59).

DOE d. NEWMAN v. RUSHAM.

seller is a different person from him who executed the voluntary conveyance it is quite otherwise; for the acts of one man cannot show the mind and intention of another.

The question, whether the statute of Elizabeth applies to a purchaser from the heir or devisee of one who has made a voluntary conveyance, is discussed in the last edition of Sugden On Vendors and Purchasers, pp. 927 *et seq.* (1), and the authorities are there collected. The learned author concludes by observing (p. 928): "Still the rule has never been carried to this extent, that a father's *bonâ fide* conveyance of the fee or of any partial interest, although voluntary, can be set aside by a sale by the devisee or heir-at-law of the father. The rule properly confined to transactions really fraudulent, or fraudulently kept on foot, seems to be open to no solid objection, and it is not likely to be carried further."

Burrel's case (2) is supposed to have decided this point in favour of the purchaser from a person different from him who made the voluntary conveyance. The facts of that case, however, do not warrant any such conclusion. There, the grandfather, on the marriage of the father, covenanted to demise the premises in [*726] question *to the father, and by indenture afterwards did demise them to the father for 1,000 years. The father, seven years afterwards, assigned the lease to his son, then an infant, to the intent that it should not be merged by descent of the reversion, and with a colourable intent that the infant should pay debts: the grandfather died; the father entered and took the profits; and nothing was done by the son under the assignment of the lease. Afterwards the father sold the land in fee to a purchaser for a large sum of money: and it was held that the purchaser should avoid the lease for 1,000 years, and the assignment. Now it is obvious that it was quite sufficient to avoid the assignment of the lease by the father; for, as soon as that assignment was out of the way, the lease for 1,000 years would be merged in the inheritance, and so there was nothing on which it was necessary that the statute of Elizabeth should operate but the voluntary assignment which was made by the same person who afterwards sold and conveyed the fee to a purchaser.

Certainly the report states the first resolution in the case to be that (3) "it is not necessary that he who sells the land should make the former fraudulent estate, or incumbrance; but, be the estate, &c. fraudulent *ut supra*, whosoever sells (makes) it, the

(1) 11th ed.
(2) 6 Co. Rep. 72 a.
(3) 6 Co. Rep. 72 b.

purchaser shall avoid such fraudulent estate &c." The resolution is entitled to great respect: but, as it goes beyond what is required by the facts of the case, we do not consider it to be conclusive.

And, further, the second resolution in *Burrel's* case (1) is quite in accordance with the view we have just taken; *for it is there [*727] said: "It was resolved, that although the father had nothing in the inheritance of the land at the time of the assignment of his term, but the whole estate of inheritance was then in the grandfather; yet when the grandfather died, and the father sold the land, his vendee shall avoid the said term by the said act (the said assignment on the evidence being taken to be fraudulent), for if he had bargained and sold the said term only, the bargainee should have avoided the said fraudulent assignment, and by consequence the vendee of the whole fee simple shall avoid it." Now, if the term only had been sold, it would plainly have been sold by the same person who made the fraudulent assignment.

In the case of *Richards* v. *Lewis* and *Doe* d. *Richards* v. *Lewis* (2) (reported in the 15th volume of the Jurist, p. 512, and in 20 L. J. C. P. 177) the Court of Common Pleas commented upon *Burrel's* case (3). The first action was detinue for title deeds; the second for the land itself. The facts were as follows. Mrs. Joseph, having a lease for years, in May, 1829, by a voluntary conveyance in contemplation of marriage with Mr. Saunders, but without his knowledge, conveyed to trustees for herself for life, with remainder to her son Rhys Morgan by a former marriage, and, if he should die without leaving issue, to Llewellyn Jenkins absolutely. She afterwards married Mr. Saunders; and, in 1837, she and her husband conveyed to Howard as trustee for themselves and the survivor for life, with remainder to Rhys Morgan absolutely. Rhys Morgan died, without issue, in 1841, having disposed of the remainder, which *he considered he had absolutely under the deed [*728] of 1837, to the lessor of the plaintiff, who before the action took an assignment from Howard the trustee of the legal interest. In December, 1840, Mrs. Saunders, having survived her husband, by deed of assignment mortgaged the term to the defendant, concealing from him the previous settlements. In 1842 she died, having bequeathed the term to Llewellyn Jenkins, who, in 1843, conveyed the equity of redemption, and all his interest in the term, to the defendant. The plaintiff had a verdict in each case. In

(1) 6 Co. Rep. 72 b.
(2) Since reported, 11 C. B. 1035.
(3) 6 Co. Rep. 72 a.

DOE d. NEWMAN v. RUSHAM.

the action of ejectment the COURT held that the deed of 1829 was good; and that Mrs. Saunders, at the time of her marriage, had only a life estate; that her husband could not be considered as a purchaser within the statute of Elizabeth; and that, on Mrs. Saunders's death, the conveyance by her and her husband in 1837 and her mortgage in 1840 were at an end; and the defendant by the conveyance from Llewellyn Jenkins had established his title: therefore a nonsuit was directed. This decision does not touch the resolution in *Burrel's* case (1). In the action of detinue a new trial was directed on the ground of surprise as to the question of sufficient search having been made for the deed of 1829. In that case it was urged by counsel for the defendant that, as the deed of 1829 was not proved, the defendant was entitled; for that the deed of 1837 was voluntary only, and was done away with by the subsequent mortgage in 1840; and for this *Burrel's* case (1) was relied on. The COURT considered that, by the deed of 1837, the husband had divested all the wife's interest; and the case did not [*729] therefore turn on **Burrel's* case (1): but in the course of the argument Mr. Justice WILLIAMS said: "Suppose a devise by the person making the voluntary conveyance, could his devisee, or his heir, revoke it by a sale? Where there is no actual fraud, must not the revoking conveyance be made by the same person who made the voluntary conveyance?" (2) The Lord Chief Justice JERVIS also, in giving judgment, said (2): "*Burrel's* case is misunderstood." "It does not appear that the Courts at that time held mere voluntariness a badge of fraud; they do not say that every voluntary deed is fraudulent. Lord Coke says, 'I acquainted Popham, Ch. J., with this resolution, and he allowed well of it, and said it was well done to construe the said Act in suppression of fraud; and (as he told me) it was adjudged before him and his companions, Justices of the King's Bench, that where a man in a secret manner made an estate to the use of his wife for her jointure, by fraud and covin, to defeat a purchaser, to whom he intended to sell the land, that in such case, if the fraud be proved in evidence or confessed in pleading, the purchaser should avoid such estate.' It is clear from this that cases of actual fraud alone were in their consideration. It is plain the deed was proved to be fraudulent in fact there, and not that the subsequent execution of

(1) 6 Co. Rep. 72 a.

(2) 15 Jur. 513, 514. The report of the judgment in 11 C. B. 1035, corresponds in effect with that in the Jurist, but does not contain the same language.

a deed for a valuable consideration was deemed to stamp a prior voluntary deed with fraud. There was fraud in fact there, and not merely fraud in law." Mr. Justice WILLIAMS also, in *giving judgment, said (1): "As to the mortgage, *Burrel's* case (2), if good law, shows, that where there is actual fraud in a conveyance, a subsequent purchase from one not guilty of the fraud is protected; but that case has no application where the fraud is only constructive. I agree with the opinion of WIGRAM, V.-C.; the consequence of holding otherwise would be, that if a father, wishing to disinherit an undeserving heir-at-law, made in his lifetime a conveyance by way of gift to his younger children, the heir upon his death might nevertheless nullify this deed by a sale, and pocket the purchase money." [*730]

The opinion alluded to of Vice-Chancellor WIGRAM is to be found in *Parker* v. *Carter* (3); but it does not appear by the report on what ground the learned VICE-CHANCELLOR proceeded. There, a sale had been made by a surviving wife of her own lands after a voluntary deed and fine by husband and wife; and it was contended that the statute of Elizabeth applied, and *Burrel's* case (2) was relied on. Two answers were made: 1st. That the deed and fine were not voluntary, for that the joining by husband and wife was a good consideration for the act of each. 2nd. That the sale was not by the same party. The VICE-CHANCELLOR merely said that the objection was answered, but did not say on which ground.

No other case is reported, so far as we have been able to find, in which this point has been determined one way or the other, except that of *Jones*, lessee of **Moffett*, v. *Whittaker* (4). There William Smith, by a voluntary deed, in 1820, conveyed after his death to Barton Smith in fee; then, by another voluntary deed, in 1828, he conveyed after his death to Richard Smith in fee; then by a third deed, in 1830, he conveyed to the defendant, professedly for 500*l.* expressed to be paid in money and 300*l.* in bonds. Richard Smith became bankrupt in 1837; and, in 1839, his assignees sold to the plaintiff for valuable consideration. William Smith died in 1840; and, the defendant having got into possession, the plaintiff brought his ejectment. The jury found that no money was paid, or bonds given by the defendant, and the deed to him, in 1830, was really fraudulent, and made colourably, to defeat the deed to Richard [*731]

(1) 15 Jur. 515.
(2) 6 Co. Rep. 72 a.
(3) 67 R. R. 100 (4 Hare, 400).
(4) Longf. & T. 141.

DOE d. NEWMAN v. RUSHAM.

Smith, in 1828. But the defendant contended that, though he had no title himself, the lessor of the plaintiff had none, for he claimed under a voluntary conveyance to Richard Smith, in 1828, which could not defeat the voluntary conveyance to Barton Smith in 1820. The case was tried before Richards, B.; and the plaintiff had a verdict; and, on motion to set it aside and enter a verdict for the defendant, the COURT held that the plaintiff was entitled to recover, saying that it was held in *Burrel's* case (1), and ever since, that a purchaser for value should avoid a prior voluntary conveyance, although made by a different person from the seller to him. The Chief Baron BRADY is reported to have stated that the defendant was grantee of a prior deed, executed for a voluntary consideration, which is a mistake of fact, though it is not material to the legal
[*732] point. Baron *RICHARDS puts it thus: "The defendant relies upon an instrument founded on fraud; not only as under the statute but as being actually fraudulent. I certainly was myself of opinion that this instrument was obtained in the year 1830, from a weak old man, and by gross contrivances for a very unworthy purpose; and so far as the application to set aside this verdict goes, I think it should be refused." This observation shows only the weakness of the defendant's own title; but it does not touch the question as to the infirmity of the plaintiff's title, on which the defendant had a right to insist. If there had been no prior deed of 1820 to Barton Smith, and the deed to Richard Smith, though voluntary, had been the first in order of time, no doubt it would have prevailed against the defendant's deed of 1830, because that deed was fraudulent in fact: and it would also have prevailed against any, even *bonâ fide*, sale and conveyance made after 1839, when Richard Smith's assignees sold for value, because it has been constantly held that if the person to whom a voluntary conveyance is made sells and conveys for value, that which was in its creation a voluntary conveyance, and voidable by a purchaser, becomes good and unavoidable by matter *ex post facto*, and will be considered as made upon valuable consideration: *Prodgers* v. *Langham* (2), and other cases, cited in Sugd. Vendors and Purchasers, p. 937 (3). This however is not by the operation of the statute of Elizabeth, but rather by excluding that operation.

The case of *Jones*, lessee of *Moffett*, v. *Whittaker* (4) is doubtless
[*733] an authority for the defendant in this case: but, *with the most

(1) 6 Co. Rep. 72 a.
(2) 1 Sid. 133.
(3) 11th ed.
(4) Longf. & T. 141.

sincere respect for the learned Judges by whom it was decided, we cannot consider it as good law. It would go the length of holding that, if there be ten voluntary conveyances, by the same man, to ten different individuals, whichever of them could first contrive to sell the property should prevail against the others. When a man who has made a voluntary conveyance afterwards sells to a *bonâ fide* purchaser, it may well be considered that, as the statute avoids the voluntary conveyance, the seller always had the estate in him, and has, at the time of the sale, that which he can convey to the purchaser: but it does not follow that he has any estate in him which he can convey to any one but a purchaser for value. He clearly has not any such estate. Therefore in the case of *Jones*, lessee of *Moffett*, v. *Whittaker* (1) William Smith had not any estate in 1828 which he could convey to Richard Smith (Richard not being a purchaser for value); for he had already conveyed away the estate to Barton Smith. So, in the present case, John Newman, when he made his will in 1844, had no estate which he could devise to Thomas Morse; for he had already conveyed it to the lessor of the plaintiff; and, if Thomas Morse took nothing under the will, how is it possible that by selling to the defendant he could convey anything to him? We presume it is not supposed that a second grantee without consideration, or a devisee, the testator having before his will conveyed away his interest without consideration, has a power of appointment in favour of a purchaser for value, although no legal interest in the property has ever vested in him.

[734]

When we consider the consequences which would follow from the doctrine contended for as regards a purchaser from an heir, we may well pause before we assent to it. We may put such a case as the following. A., tenant for life of large estates under his marriage settlement, with remainder to his first son in tail, has also unsettled estates in fee. He has several sons and daughters. He makes a voluntary conveyance of his unsettled estates to himself for life, remainder to his younger children. A. dies. His eldest son succeeds to the large settled estates under the marriage settlement of his father. It is plain that he takes nothing in the others, either as heir or otherwise. But he makes a sale of those others to a *bonâ fide* purchaser. According to the doctrine contended for, the purchaser shall avoid the father's voluntary deed, and take away from the younger children the estates in which their father

(1) Longf. & T. 141.

DOE d. NEWMAN v. RUSHAM.

had the fee and had conveyed it to them. The eldest son shall put the purchase money into his pocket, and his brothers and sisters shall be beggars. This is a monstrous consequence; and yet there is no escaping from it, if the doctrine contended for be law.

There is indeed this difference between the case of a purchaser from an heir and that of a purchaser from a devisee, that, in the former case, the ancestor has done no act whereby he has shown any intention to repudiate his voluntary conveyance, whereas in the latter the testator has done such an act by the devise in his will.

But that act of devising does not show any intention in his mind to sell the property, nor that his devisee shall sell it. It [*735] does not show that he at any time *contemplated a sale; and therefore it cannot, by reference to the time of the voluntary conveyance being made, raise the inference that he intended to defraud purchasers. In truth neither heir nor devisee in such a case has any estate in him, and therefore cannot possibly pass any to a purchaser.

The case of *Warburton* v. *Loveland* (1) in the House of Lords was much relied on in the decision of *Jones*, lessee of *Moffett*, v. *Whittaker* (2). That case however turned on the Registry Acts, and on the construction to be put on the express enactments contained in them. It was held that want of registry made all deeds affected by it void as against purchasers, not only from the persons making those deeds, but from those who were entitled to the estates supposing those deeds not to have been made. Upon reading the opinion of the Judges delivered by TINDAL, Ch. J. in that case, it will be found to turn entirely upon the particular Acts of Parliament under discussion, and not to be any authority for the doctrine now contended for under the statute of Elizabeth.

Upon the whole, we are all clearly of opinion that a purchaser from the devisee of one who has made a voluntary conveyance in his lifetime is not within the statute, and that this rule to enter a verdict for the defendant must be discharged.

We have deferred giving judgment in this case for several Terms, from our respect for the decision of the Irish Court of Exchequer in *Jones*, lessee of *Moffett*, v. *Whittaker* (2), and from a desire, after [*736] an attentive examination *of all the authorities upon the subject, to state fully the grounds on which we feel ourselves bound to differ from that decision. Having heard of a misconception which arose

(1) 2 Dow & Cl. 480. (2) Longf. & T. 141.

on a former occasion when I objected to the citation of a decision of an Irish Court on a mere point of practice, I beg now to state that, in my opinion, the defendant's counsel were fully justified in citing this decision of an Irish Court on the construction of an Act of Parliament which is common to both parts of the United Kingdom. Our procedure and theirs are regulated by different statutes, different rules and different usages; and on mere questions of procedure no assistance can be derived in one island from the decisions of the Courts in the other. But in considering questions arising on statutes, or on the great principles of jurisprudence, which we have to interpret in common, I will take upon myself to say that we shall always be pleased to have assistance from the decisions of our learned brethren in Ireland, and that we shall treat with the same deference a judgment pronounced in any of the four Courts in Dublin as if it had been pronounced in Westminster Hall.

Rule discharged.

GEE *v.* MAYOR, &c. OF MANCHESTER.

(17 Q. B. 737—745; S. C. 21 L. J. Q. B. 242; 16 Jur. 758.)

1851. *Nov.* 11.
1852. *Jan.* 13.

[737]

By will, executed before 1838, testator devised and bequeathed his real and personal estate, to be divided "equally amongst my children in manner following viz.: I will and bequeath to my eldest son A. one seventh share of my property, to his heirs, executors and administrators." Then followed devises and bequests in the same words to each of testator's six other children. "And, in case any of my sons or daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and, in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." All the seven children survived the testator:

Held, that "die" must be construed to mean "die in the lifetime of the testator," and consequently that each of the children took a fee simple in one seventh of the realty, and the absolute interest in one seventh of the personalty.

THE following case was, by order of KNIGHT BRUCE, V.-C., stated for the opinion of this Court.

William Gee was, at the date of his will and thence up to and at the time of his death, seised in fee simple of divers freehold estates, and possessed for long terms of years, still unexpired, of divers leasehold estates; and, being so seised and possessed, the said William Gee duly made and published his last will and testament in writing, which was executed and attested as by law was then required to render valid devises of real estates; the material part of which was as follows.

GEE v. MAYOR &C. OF MANCHESTER.

"Furthermore, I will and bequeath the whole of my freehold, leasehold and personal property to be divided equally amongst my dear and affectionate children in manner and form following: that is to say, I will and bequeath to my eldest son Adam Gee one seventh share of my property, to his heirs, executors and administrators; and another seventh share I give to my daughter Sophia Gee, to her heirs, executors and administrators; and another seventh share to my daughter Mary Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my son Joseph Gee, to his heirs, executors and administrators; [*738] and *another seventh share I give and bequeath to my daughter Ann Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Martha Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Elizabeth Gee, to her heirs, executors and administrators: and, in case any of my sons or daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and, in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike."

The said testator departed this life on the 14th day of July, 1828, without having in any way revoked or altered his said will, leaving him surviving his said seven children therein named: and his executrix and executors duly proved his said will after his death in the proper Ecclesiastical Court, and assented to the bequests made by his said will of the leasehold property.

One of the said seven children of the said testator has since died intestate, and leaving him surviving an eldest son, who is heir-at-law, and several other children: and administration of the estate and effects of such deceased child has been granted to his said eldest son, by the proper Ecclesiastical Court. The questions for the opinion of this Court are:

First: Whether the eldest son and heir-at-law, or all the children, of the said deceased child of the said testator, is or are entitled to such deceased child's share in the freehold estates of which the said testator died seised in fee?

Secondly: Whether the eldest son and administrator, or all the [*739] children, of such deceased child, is or are *entitled to such deceased child's share in the leasehold estates of which the said testator died possessed for terms of years?

The case was argued in last Michaelmas Term (1).

Crowder, for the eldest son:

The first part of the will, standing alone, would in express words give to each of the seven children an estate in fee in the realty, and the whole interest in the personalty. Then follow the provisions that "in case any of my sons or daughters die without issue" their share shall go over. That cannot operate as an executory devise displacing the fee; for, if it is so construed, the event in which it is to happen is an indefinite failure of issue, and is too remote. If the will stopped there, it might be construed as giving each of the children of the testator an estate tail in the realty with remainder over; but then the will goes on to say, "and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." That devise is inconsistent with the deceased parents taking an estate tail. The only way of reconciling these inconsistent devises is to construe the death, with or without leaving issue, mentioned in the will, as meaning death in the lifetime of the testator. Such a construction has been adopted in similar cases: *Doe*, lessee of *Lifford*, v. *Sparrow* (2), *Clayton* v. *Lowe* (3), *Da Costa* v. *Keir* (4), *Slade* v. *Milner* (5). The devise to each child of the testator, his heirs, executors and administrators, cannot be cut down to an estate for life by the devise over in case the child die without leaving issue; such a devise *over can operate only by way of executory devise, or by cutting down the previous estate to an estate tail: *Doe* d. *Cadogan* v. *Ewart* (6). [*740]

Barstow, for the younger children (7):

The testator uses words clearly showing an intention that all the issue of each of his children shall take their parent's share, share and share alike; and it is sought to defeat this devise by interpolating the words "in my lifetime" after the word "die." The authority mainly relied on for this is *Clayton* v. *Lowe* (3), a case which has been much commented upon in 2 Jarman on Wills, 691. The effect of the whole will taken together is a devise of one seventh

(1) November 11. Before Lord Campbell, Ch. J., Patteson and Coleridge, JJ.

(2) 13 East, 359.

(3) 24 R. R. 509 (5 B. & Ald. 636).

(4) 27 R. R. 93 (3 Russ. 360).

(5) 4 Madd. 144.

(6) 45 R. R. 789 (7 Ad. & El. 636).

(7) *Willes* appeared for some of the younger children; but, as their interest was the same, the COURT declined to hear more than one counsel.

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of the realty and personalty to each child for life, with remainder as to the realty, and an executory bequest as to the personalty, to the children of that child, if he has any, as tenants in common; and, if the child has no children, to the rest of the testator's children.

(PATTESON, J., referred to *Barker* v. *Barker* (1).

Crowder was heard in reply.

Cur. adv. vult.

LORD CAMPBELL, Ch. J. now delivered judgment:

The will of the testator in this case contains the following words: "Furthermore, I will and bequeath the whole of my freehold, leasehold and personal property to be divided equally amongst my dear and affectionate children in manner and form following: that [*741] *is to say, I will and bequeath to my eldest son Adam Gee one seventh share of my property, to his heirs, executors and administrators." Then follow devises and bequests, in the very same words, of one seventh to each of his other six children. No doubt these words, without more added, will pass the fee simple in one seventh of the freeholds, and the absolute interest in one seventh of the leaseholds, to each of the children: and such must have been the testator's meaning; because, though the word "heirs" is capable of two senses, and may from other parts of the will have the sense of "heirs of the body" attached to it, the words "executors and administrators" are not capable of two senses, and must be intended (though not necessary for that purpose) to pass the whole interest. Then follow these words: "And, in case any of my sons or daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and, in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." Now the former part of this clause, if it stood alone, would, according to the case *Doe* d. *Cadogan* v. *Ewart* (2) and the various authorities there cited and commented on, give to each of the children an estate tail in the freehold. But, in this case, it cannot have been intended by the testator: nor can that part of the clause be construed to give an estate tail in the freeholds by affixing to the word "heirs" in the original devise the sense of "heirs of the body;" for the latter part of the clause expressly provides that, if there be issue, they

(1) 29 R. R. 91 (2 Sim. 249). (2) 45 R. R. 789 (7 Ad. & El. 636).

(that is *all* the issue) shall take their parent's share, *share and share alike; so that, by the latter part of the clause, all the children of each devisee would take their parent's share as purchasers, whereas, if the former part of the clause be construed to give an estate tail, the eldest son only would take his parent's share, as issue in tail, by descent. Thus there would be a manifest inconsistency and indeed contradiction between the two parts of the clause. [*742]

If, therefore, the eldest son of the deceased parent takes all, he must do so as heir general in respect of the freehold, and as administrator in respect of the leasehold. On the other hand, if all the children of the deceased parent are to take, they must do so in one of two ways: either by way of executory devise and bequest, or by holding that the last clause cuts down their parent's interest to an estate for life, rejecting the words "heirs, executors and administrators" in the original devise and bequest.

First, with respect to executory devise.

An executory devise is only good where the whole estate is devised in the first instance, but, on the happening of some contingency, such estate is defeated, and another person is to take, so that, but for the happening of the contingency, the first devisee could keep the whole estate. Now, as regards the leaseholds, the parent under this will would take the interest; and, by the former part of the last clause taken alone, without the latter part, there might be a good executory bequest to the surviving brothers and sisters on such parent dying "without leaving issue living at the time of his death;" for so the words if he "die without issue" would be construed in regard to the leaseholds, according to the case of *Forth* v. **Chapman* (1); though, in regard to the freeholds, the same [*743] words would be construed to mean an indefinite failure of issue, and give an estate tail. But then the parent, if he did leave issue living at the time of his death, would keep the whole interest, since the contingency which was to defeat it would not have happened. But, when the latter part of the last clause is taken with the former part, as it must be, it is plain that the parent never could keep the whole estate; there is no contingency at all; one of the events specified in the last clause must of necessity happen; and the estate of the parent must be defeated at his death. He must die at some time, and he must die with or without issue, in whatever sense those words are taken; and on his death either his brothers

(1) 1 P. Wms. 663.

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and sisters or his children must take. By no possibility can he himself have and keep the whole estate expressly given him by the original devise and bequest; whereas such possibility is an essential ingredient to make an ulterior limitation operate by way of executory devise. This will therefore cannot so operate. It is indeed argued in Mr. Jarman's book, vol. 2, p. 691, commenting on *Clayton* v. *Lowe* (1) (which is on all fours with the present case), that a testator may by his will give to A. an estate of inheritance during his life, though by the same will he makes his estate to determine at his death. At first sight this looks very like a contradiction in terms; but it is possible to conceive that there may be a devise to A. and his heirs, and further that, if he has not disposed of the estate in his lifetime, and dies possessed of it, it shall on his death go over; but that is not the present case; and in truth, if all the children [*744] are to take, it must be by the second way suggested; viz.: *by cutting down the estate of their parent to an estate for life. Now the rule laid down by Lord ELLENBOROUGH, in giving the judgment of the COURT in *Doe* d. *Lifford* v. *Sparrow* (2), appears to us to be the true one. "It is material to consider whether the devise to the testator's son and daughter can operate so as to give effect to all the words he has used, without rejecting anything contained in the devise, or introducing anything which it does not contain; for there can be no rejection or introduction, if all the words as they stand can operate; but if all the words as they stand cannot operate, the Court must introduce or reject as may best answer what may appear to them to have been the testator's intention." Applying this rule to the present case, we must see whether we are compelled to reject and so justified in rejecting altogether the words "heirs, executors and administrators" in this will, or whether we can give effect to those words, and also to the words in the last clause. Now the only mode of giving effect to them all is by treating the words in the last clause as words of substitution only in case of a lapse, and referring the time of the death of the parent there contemplated to the lifetime of the testator. This was the construction adopted in the case of *Doe* d. *Lifford* v. *Sparrow* (3), in which case however there were other words pointing to such a construction in a subsequent limitation, in which the words "both dead at the time of my decease" were used. The same construction was also adopted in *Clayton* v. *Lowe* (1), which (as we have observed) is precisely the

(1) 24 R. R. 509 (5 B. & Ald. 636).
(2) 13 East, 363.
(3) 13 East, 359.

same as the present case. A similar construction was adopted in *Barker* v. *Cocks* (1), except that in that case, *there being an antecedent devise to a tenant for life, remainder to the devisee in question, general words speaking of the death of such devisee were held to refer to his death in the lifetime of the tenant for life. It appears to be an established rule that where a bequest is simply to A., "and in case of his death" or "if he die" to B., A. surviving the testator takes absolutely. See Powell on Devises, vol. 2, p. 758 (3rd ed.), and Williams on Executors (3rd edition), p. 1000 (2), and the cases there cited. The time of dying is referred of necessity to the lifetime of the testator; otherwise, as A. must die at some time, the bequest would be cut down to an interest for life. The present case seems to us to be within the same rule; for the dying of A. with or without issue is as certain and inevitable an event as the dying of A. simply.

[*745]

For those reasons we are of opinion that we must construe the last clause in this will as referring to the death of the devisees in the lifetime of the testator, in order to give effect to all the words of his will and to reject nothing. In so doing we are not adding to his will or introducing new words into it, but only construing the words which the testator has used himself; these words as they stand are capable of referring to death in his lifetime or to death generally at any time. We think that the case of *Clayton* v. *Lowe* (3) was well decided, and shall certify that in our opinion the eldest son and heir-at-law and administrator, excluding the other children of the deceased, is entitled as well to the freehold as to the leasehold estates.

A certificate to that effect was sent.

HARTFIELD *v.* ROTHERFIELD (4).

1851. *Nov.* 13. 1852. *Jan.* 21.

(17 Q. B. 746—753, 759—763; S. C. 21 L. J. M. C. 65; 16 Jur. 244.)

[746]

Under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, time during which a pauper has been in prison cannot be taken into computation for the purpose of making up, or for the purpose of breaking, a five years' residence.

Therefore, where a pauper, having resided with his family in parish R. ten years, was committed to a prison situate in another parish on a charge of felony, convicted, and confined in gaol in a third parish under a sentence of two years' imprisonment, the family continuing to reside in R., and a warrant was then applied for to remove the family from R. to their place of settlement:

Held that the time during which the pauper had been absent from the

(1) 63 R. R. 17 (6 Beav. 82).
(2) Pp. 1082, 1083 (4th ed.).
(3) 24 R. R. 509 (5 B. & Ald. 636).
(4) See *St. Olave's Union* v. *Canterbury Union* [1897] 1 Q. B. 682, 685, 66 L. J. Q. B. 471, C.A.

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residence of his family, and in prison, out of parish R., before the application for a warrant, could not be regarded as breaking the residence in R.: and that the family were irremoveable.

Pauper had resided in parish A. five years next before the application after mentioned, exclusive of a period during which he was in the workhouse of that parish, and exclusive of two several periods, of two weeks and three weeks, during which he was imprisoned in a house of correction not in parish A., for misbehaviour in the said workhouse. After completion of the five years, and while pauper still resided in A., application was made for an order of justices to remove him from A. to the place of his settlement:

Held, that the two periods of imprisonment were to be excluded, for all purposes, in the computation of the pauper's residence in A., and that he was therefore irremoveable under the Poor Removal Act, 1846, s. 1:

Held also that, but for the proviso of sect. 1, excluding periods of imprisonment from computation, the imprisonments above described would have broken the residence, though the pauper was not committed for felony, and though he always, during his absences from parish A., intended to return thither.

THE following case was stated by consent and by order of a Judge, under stat. 12 & 13 Vict. c. 45, s. 11.

On 21st March, 1851, an order of two justices for Sussex was obtained, by the parish officers of the said parish of Rotherfield, for
[*747] the removal of Sarah Edwards, *the wife of James Edwards, and her four children, from that parish to the said parish of Hartfield. Notice of appeal having been given in due time &c., the following facts are stated for the opinion of the Court of Queen's Bench.

The parish officers of Hartfield admit the settlement of the paupers to be in their parish, but contend that they are irremoveable under stat. 9 & 10 Vict. c. 66, s. 1.

James Edwards, the husband of the pauper, had, up to January, 1851, resided continuously in the said parish of Rotherfield for more than ten years without having received relief from any parish: and his wife and children were not removeable from Rotherfield under the said order unless the following facts constitute a break in their residence there.

On 8th January, A.D. 1851, the said James Edwards and his said wife were apprehended upon a charge of felony, and committed from their parish of residence to the county gaol of the said county of Sussex, situate at Lewes in the said county, which gaol is about eighteen miles distant from Rotherfield. They both remained in prison there until 13th March last; when they were tried under a commission of general gaol delivery at Lewes; and James Edwards the husband was convicted of the felony, and sentenced to two years' imprisonment in a county gaol and house of correction for the said county situate at Petworth in the same county. Petworth

is about fifty miles distant from Rotherfield. The said James Edwards has ever since continued to be imprisoned in the gaol at Petworth in execution of that sentence. Sarah Edwards was acquitted and discharged, and immediately returned to her previous residence in the parish of Rotherfield, where the children had continued during the absence in prison of both *parents, and where [*748] Mrs. Edwards and the children still reside.

The paupers have no settlement other than that of James Edwards the husband.

In case the Court of Queen's Bench should be of opinion that under the circumstances stated the paupers, by reason of such imprisonment of the said James Edwards out of the parish of Rotherfield, are removeable therefrom, then &c.: agreement that the said order of justices shall be confirmed and judgment be entered accordingly at the Sessions next but one &c., pursuant to the statute; but, if the Court of Queen's Bench should be of opinion that the paupers are irremoveable from the said parish of Rotherfield, the said order is to be quashed, and judgment accordingly entered at the said Sessions: in either event, without costs to either party.

The case was argued last Term on a *concilium* (1).

Pashley, in support of the order of Sessions:

The general principle is that removal breaks the residence; and neither the shortness of the time of absence, nor the intention (if without the power) to return, makes any difference: *Reg.* v. *Halifax* (2). The same principles have been acted upon in a later case (3).

(LORD CAMPBELL, Ch. J.: Those decisions were on removals by order of justices.)

In *Reg.* v. *Salford* (4) the pauper had resided in Salford, the removing parish, for thirteen years next before the removal, except some months during which, and within the last five years, he was confined, under sentence for misdemeanor, in a house of correction out of Salford. This Court held that the *period during which he [*749] so resided out of the parish constituted a break. *Reg.* v. *Pott Shrigley* (5) was a similar case.

(1) November 13th. Before Lord Campbell, Ch. J., Patteson, Coleridge and Wightman, JJ.

(2) 76 R. R. 221 (12 Q. B. 111).

(3) See *Reg.* v. *Caldecote*, *ante*, p. 339 (17 Q. B. 52).

(4) 12 Q. B. 106.

(5) 76 R. R. 233 (12 Q. B. 143).

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(PATTESON, J.: There no five years' residence had ever been completed.)

The decision proceeded upon the authority of *Reg.* v. *Salford* (1). The intention of stat. 9 & 10 Vict. c. 66, s. 1, is that the privilege of irremoveability should not be given to felons.

(LORD CAMPBELL, Ch. J.: Suppose the prison were within the parish.

COLERIDGE, J.: The time of imprisonment would still be excluded from computation by the words "shall be a prisoner in a prison." The intention of the statute probably was that parishes in which prisons were should not be in danger of having the prisoners fixed upon them.)

The Legislature must have contemplated that irremoveability should cease when the person had been removed from the parish.

(LORD CAMPBELL, Ch. J.: If a lunatic were confined in an asylum within the parish, the period of confinement would not reckon in the five years, but there would be no break; you say it would be otherwise if the asylum were out of the parish.)

Reg. v. *Holbeck* (2) may be cited on the other side; but that case was argued and decided on the particular circumstances, and shows only that imprisonment is not necessarily a break. The respondents are not obliged, in this case, to draw an exact line as to the imprisonment which shall thus operate; but imprisonment out of the parish for felony clearly does so. Otherwise the constructive residence might be held to last through a twenty years' transportation. Stat. 35 Geo. III. c. 101, s. 5, enacts that every person who
[*750] *shall have been convicted of any felony shall be considered actually chargeable, within the meaning of that Act, to the parish in which he shall reside, and shall be liable to be removed to the parish of his last legal settlement. The person so convicted, therefore, cannot any longer be an irremoveable resident, unless stat. 9 & 10 Vict. c. 66, s. 1, was meant to repeal the prior Act; but no such intention appears.

Pickering, contrà:

Stat. 35 Geo. III. c. 101, s. 5, was intended only to fix

(1) 12 Q. B. 106. (2) 83 E. R. 513 (16 Q. B. 404).

chargeability, which is not in question here. *Reg.* v. *Holbeck* (1) decides expressly that imprisonment out of the parish is not of itself a break. *Reg.* v. *Salford* (2), there cited, is the only case which appears to establish the contrary.

(LORD CAMPBELL, Ch. J.: The COURT laboured to distinguish *Reg.* v. *Holbeck* (1) from that case.)

It is argued here that *Reg.* v. *Holbeck* (1) was decided upon its own circumstances: but the COURT there insisted generally upon the danger of allowing the right consequent upon residence to be defeated by imprisonment; and they said: "Nor is there anything in the statute tending to define the meaning to be attached to the term 'residence,' which is capable of being applied to various combinations of facts: neither is there any authority for it." If the party is absent under compulsion of law (other than removal under an order of justices, which may stand upon different grounds) there is no break of the residence. The family, here, continued to reside.

(COLERIDGE, J.: That cannot make the distinction.

LORD CAMPBELL, Ch. J.: Do you say that, if the husband went to Australia *under sentence of transportation for life, he might be considered as still residing here?) [*751]

It must be admitted that there should be some *indicia* of continued residence; and it is difficult to say where the line should be drawn. In *Reg.* v. *Holbeck* (1) the case of *Reg.* v. *Pott Shrigley* (3) as well as that of *Reg.* v. *Salford* (2) was distinguished from the case then before the Court. *Reg.* v. *Holbeck* (1) clearly shows that the power to return, in addition to the *animus*, is not necessary to a residence. The imprisonments there were for non-payment of fines for misdemeanor; but the cause of detention can make no legal difference. There is a personal absence in each case; the question is, how it operates. If the party is imprisoned on a charge of felony, is he absent after conviction, and not absent before? It is agreed that, if the prison be within the parish, and the wife and family continue residing, there is no absence to constitute a break.

(COLERIDGE, J.: Only the time of imprisonment does not reckon in the five years.)

(1) 83 R. R. 513 (16 Q. B. 404).
(2) 12 Q. B. 106.
(3) 76 R. R. 233 (12 Q. B. 143).

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No one will contend that such an imprisonment is an absence if the charge be felony but not if it be a misdemeanor: then why should felony constitute an absence when the imprisonment is out of the parish? In *Nias* v. *Davis* (1) it was held that a person who had a permanent dwelling-place in London, where his wife and family lived, but was himself a prisoner under a *ca. sa.* in Radnorshire, was sufficiently a resident in London to petition the London Court of Bankruptcy. *Rex* v. *Mitchell* (2) is to a similar effect, as to the inhabitancy of an absent militia-man.

[*752] (LORD *CAMPBELL, Ch. J.: I am afraid these common law cases of constructive residence will not assist us much.)

Pashley, in reply:

The supposed case of transportation has not been answered, and reduces the argument on the other side *ad absurdum*. The mere *animus revertendi*, without the right, cannot be regarded.

(COLERIDGE, J.: Suppose the party is committed on a charge of felony, confined six months, and acquitted. Is he removeable or not?

LORD CAMPBELL, Ch. J.: Suppose he is taken up for a breach of the peace, and detained three months in default of finding bail. Is that a break?)

The latter case would be like *Reg.* v. *Holbeck* (3). It is not necessary to draw an exact line between that case and the present: it is enough to maintain that a distinct rule applies to all cases of felony. Irremoveability under stat. 9 & 10 Vict. c. 66, is a privilege, and is lost by absence under sentence of imprisonment for felony.

(LORD CAMPBELL, Ch. J.: Will you lay down a principle in terms?)

No general principle is asserted: but the case of felony stands upon its own grounds: felony is distinct from all other causes of commitment; and all cases of felony will come under the same rule: *Gray* v. *The Queen* (4) affords an instance. Felony is a civil death.

(COLERIDGE, J.: When did James Edwards die, in this case?)

(1) 4 C. B. 444.
(2) 10 East, 511.
(3) 83 R. R. 513 (16 Q. B. 404).
(4) 65 R. R. 218 (11 Cl. & Fin. 427).

When he received judgment; and the effect of the judgment would relate back to the time of his leaving the parish to go to prison. HARTFIELD v. ROTHERFIELD.

(LORD CAMPBELL, Ch. J.: You will allow that there is a continued residence if the party is acquitted, though he has lain six months in gaol?)

It is enough *to say that the present case is very different from that. At common law, if a man was banished, or had abjured the realm, his wife was regarded as a *feme sole*: 4 Vin. Abr. 152, 153, tit. Baron and Feme (L. a); Co. Litt. 132 b, 133 a. [*753]

Cur. adv. vult.

REG. *v.* ST. ANDREW, HOLBORN.

1851. *Nov.* 19. 1852. *Jan.* 21.

(17 Q. B. 753—759, 764—765; S. C. 21 L. J. M. C. 69; 16 Jur. 246.)

ON appeal against the after-mentioned order of justices, dated 15th October, 1850, the Sessions confirmed the order, subject to the opinion of this Court upon a case, the material parts of which were as follows. [753]

The order appealed against was for the removal of Thomas Connor, single man, aged 19 years (the illegitimate son of Ellen Connor, deceased), from the parish of St. Mary, Islington, to the parish of St. Andrew, Holborn-above-Bars, in the county of Middlesex, the place of his last legal settlement; and the ground of appeal was that, at the time of the application for, and making of, the said order, the said Thomas Connor was irremoveable from St. Mary, Islington, by reason of five years' residence in the said parish, within stat. 9 & 10 Vict. c. 66, s. 1.

At the hearing of the appeal, it appeared that the pauper had resided in the respondent parish for upwards of ten years next before the application, and upwards of five years next before the said application, excluding in the computation of the said five years the time during which he was an inmate of the workhouse of the said parish, and the times during which he was imprisoned, as hereafter *will appear. The COURT, however, determined that the pauper was removeable, and that the order ought to be confirmed, as they considered that the residence in the respondent parish was interrupted and broken by the following facts. [*754]

On the 2nd January, 1849, the pauper, being then an inmate of the workhouse of, and situated in, the respondent parish, was charged with misbehaviour in such workhouse, and was therefore

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ordered to be imprisoned for three weeks in the house of correction for Middlesex. The pauper underwent such imprisonment in the said house of correction, which is not situate in the said parish of St. Mary, Islington, but in the neighbouring parish of St. James, Clerkenwell. (The case then set out the warrant under which the pauper was imprisoned.)

On the 27th of March, 1850, the pauper, then again residing in the workhouse of and in the respondent parish, was again similarly committed to the house of correction on a like charge of misbehaviour in the said workhouse, and on this second occasion he suffered an imprisonment of two weeks in the house of correction, under such last mentioned commitment. On the termination of each imprisonment the pauper immediately returned to, and was received in, the said workhouse of the respondent parish; and the COURT found (if warranted in so finding) from the fact of his actual return above named, and having no other evidence of his intention before them, and such finding being material to the case, that it was always his intention to return, from the time of his committal.

The question for the opinion of this Court was: whether the imprisonment described was insufficient to destroy the pauper's irremoveability from the respondent parish. If the Court should [*755] decide in the affirmative, *the order of Sessions was to be quashed, and the order of removal quashed, on the ground of irremoveability. If the Court should decide otherwise, both orders to stand confirmed.

The case was argued in last Term (1).

Bodkin, in support of the order of Sessions:

An actual removal out of the parish, by operation of law, where the pauper has no power to controul or stop the removal, is a break in the residence: *Reg.* v. *Salford* (2), *Reg.* v. *Pott Shrigley* (3), *Reg.* v. *Halifax* (4), *Reg.* v. *Seend* (5). On the other side, *Reg.* v. *Holbeck* (6) will be relied on.

(COLERIDGE, J.: There the pauper was imprisoned, out of the parish, in default of paying a fine, upon a summary conviction: was it not in his power, in that case, to relieve himself from imprisonment by paying the fine?)

That fact does not appear. Lord CAMPBELL, Ch. J. there asked

(1) November 19th, 1851. Before Lord Campbell, Ch. J., Patteson and Coleridge, JJ.

(2) 12 Q. B. 106.

(3) 76 R. R. 233 (12 Q. B. 143).

(4) 76 R. R. 221 (12 Q. B. 111).

(5) 76 R. R. 227 (12 Q. B. 133).

(6) 83 R. R. 513 (16 Q. B. 404).

what would be the effect of a temporary imprisonment upon a charge which was afterwards dismissed. It would seem that in such a case the pauper would be reinstated in the rights which he had before the imprisonment, as soon as it was shown to be unfounded. *Rex* v. *Great Salkeld* (1) is decided on that principle. The objection, therefore, suggested in *Reg.* v. *Holbeck* (2), that frivolous commitments of paupers might be purposely made, amounts to nothing; such commitments would not affect the *residence. Nor is it likely that there would be collusion between [*756] the magistrates and the parish officers, especially at the risk of a criminal information. In *Reg.* v. *Holbeck* (3) the COURT assumed that the pauper had a residence in the parish from which he was removed, and an intention of returning thereto as soon as the term of his imprisonment had expired. That assumption cannot be made as a general rule; nor can it be made in the present case, where the pauper has no domicile.

(LORD CAMPBELL, Ch. J.: What general rule would you suggest?)

That, wherever a pauper is removed by a legal instrument to another parish, and he submits, he cannot be held to have, while there, the power or the intention of returning.

(LORD CAMPBELL, Ch. J.: The COURT arrived at an opposite conclusion upon those very facts, in *Reg.* v. *Holbeck* (2).)

Perhaps it would be more correct to say that, where he submits, when he has the power of terminating the imprisonment if he chooses, he cannot be held to have an *animus redeundi*.

(COLERIDGE, J.: The statute does not say anything about a break of residence; do you make use of that phrase as explaining the enactment or the proviso?)

It has already been decided that such a bar to irremoveability as is here contended for does not arise under the proviso; it amounts to a break in the residence, or nothing.

(LORD CAMPBELL, Ch. J.: Suppose an imprisonment within the parish, and, exclusive of the period of that imprisonment, a residence for five years; is the pauper removeable?

(1) 6 M. & S. 408.
(2) 83 R. R. 513 (16 Q. B. 404).
(3) 83 R. R. 518 (16 Q. B. 409).

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COLERIDGE, J.: The proviso, which excludes, for all purposes, the different periods *named from the computation of a five years' residence, still leaves open the question, What does "shall have resided," in the enacting clause, mean?)

Pashley, contrà:

Reg. v. *Salford* (1) is no doubt a strong authority, but it is the only one, to show that the proviso does not extend generally to all imprisonments, whether in or out of the parish in which the pauper resides. *Reg.* v. *Halifax* (2) decides only that a removal under the Poor Law Acts is a disruption of residence; it is no authority as to the effect of an imprisonment. And in *Reg.* v. *Leaden Roothing* (3), which decided that a lunatic pauper might be removed by an order of justices to an asylum out of the parish in which he had resided for more than five years before the application for such order, the COURT seems to have doubted whether such removal would create a break in the five years' residence.

Moreover, a distinction may be drawn between imprisonment for felony and imprisonment for minor offences. In the former case a break of residence necessarily takes place; for the felon loses all civil rights. The Crown has still the year, day and waste in the land of a felon: 2 Inst. 36; and may even destroy his house, so that he has no place to return to. In such cases, therefore, there can be no *animus redeundi*. It would be a violent assumption to hold that anything short of felony creates such a break.

(LORD CAMPBELL, Ch. J.: Would you import that distinction into the enacting clause, or into the proviso?)

[*758] Into the *enacting clause.

(COLERIDGE, J.: Can the legal incidents of an imprisonment be affected by the existence or non-existence of an intention to return? Suppose the case of a man imprisoned for a misdemeanor, who does not intend to return.)

The distinction seems to be, that in cases of imprisonment for misdemeanor the question of constructive residence turns upon the existence of an *animus redeundi;* but that in cases of imprisonment for felony the *animus redeundi*, if it exists, makes no difference; the residence is broken. It is obvious that a wider rule as regards the

(1) 12 Q. B. 106.
(2) 76 R. R. 221 (12 Q. B. 111).
(3) 76 R. R. 246 (12 Q. B. 181).

creation of a break in the residence by imprisonment would encourage fraudulent and collusive charges against paupers, a danger of which *Reg.* v. *St. Marylebone* (1) is an instance, and which is guarded against by sect. 6 of stat. 9 & 10 Vict. c. 66. An imprisonment for any offence short of felony cannot create a break in the residence, any more than an attachment for non-payment of costs, or a committal under the County Courts Act.

(LORD CAMPBELL, Ch. J.: Do you contend that, under the enacting clause of sect. 1, there is still a constructive residence, in spite of such an imprisonment as that in the present case?)

Yes: and it is important that the definition of residence should not be too much restricted.

(COLERIDGE, J.: Then, in cases of imprisonment for offences short of felony, it is for the Sessions to say whether there was an *animus redeundi* or not.)

It is so: *Reg.* v. *Tacolnestone* (2).

The civil law recognises a distinction analogous to the distinction in the English law between felony and minor offences. In those cases where the offence was punished by *deportatio*, the culprit lost his *domicilium* *and all civil rights; where he was punished by *relegatio* only, he retained his *domicilium*. (Upon this point *Pashley* referred to Cujacius (vol. ii. p. 1506, C. ed. Lugd. 1614), and various commentaries upon the Digest and the civil law). [*759]

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (January 21st), delivered the judgment of the COURT in both cases.

HARTFIELD *v.* ROTHERFIELD.

We are of opinion in this case that the order of removal ought to be quashed.

The question turns entirely on the right construction of stat. 9 & 10 Vict. c. 66, s. 1, the material words of which are: "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant: provided always, that the time during which such person

(1) 83 R. R. 464 (16 Q. B. 299). (2) 76 R. R. 238 (12 Q. B. 157).

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shall be a prisoner in a prison, or shall be serving her Majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift, shall for all purposes be excluded in the computation of time hereinbefore mentioned:" "provided always, that whenever [*760] any person *shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable."

The order of removal of Sarah Edwards, wife of James Edwards, and their children, from the parish of Rotherfield to the parish of Hartfield, their place of settlement, was obtained on 21st March, 1851. Down to 8th January, 1851, James Edwards had continuously resided in Rotherfield for more than ten years without having received relief from any parish. On that day he was apprehended on a charge of felony, and committed to the county gaol, which is out of the parish of Rotherfield. He remained in prison till the 13th of March following, when he was tried at the Assizes, convicted of felony, and sentenced to two years' imprisonment in a house of correction out of the parish of Rotherfield. There he remained when the order of removal was made. We are to determine whether by reason of this imprisonment his wife and children were removeable to the place of his settlement.

Looking merely to the first enactment of the statute, they clearly were removeable; for that requires that regard should be had to the state of facts at the time when the warrant was applied for; and James Edwards cannot be considered as being then resident in the parish of Rotherfield. If it had been found as a fact that he intended to return thither at the expiration of his sentence, we should have thought this quite immaterial; for, being imprisoned in another parish, under lawful authority, without any power of leaving his prison, he cannot be considered constructively resident elsewhere. Therefore, if there had been no subsequent provision [*761] in *the statute as to imprisonment, as soon as James Edwards had been lawfully imprisoned out of the parish of Rotherfield the effect of his prior residence there to confer irremoveability upon him and

his family would have been entirely gone. But a provision follows, "that the time during which such person shall be a prisoner in a prison" "shall for all purposes be excluded in the computation of time hereinbefore mentioned." What are the purposes here referred to? These two appear to be included: first, computing whether there has been altogether a residence of five years within the parish; and, secondly, computing whether there has been a continuous residence of five years down to the time when the warrant is applied for. Both must concur to confer irremoveability. What then is the intention of the Legislature by this provision? First: that, in computing whether the pauper has resided altogether five years in the parish, the time during which he has been a prisoner in any prison either in or out of the parish shall be excluded from the computation; and, secondly, that the same course shall be pursued in computing whether there has been a residence of five years next before the application for the warrant; or, in other words, that the time of the imprisonment shall neither tell in making up the five years nor shall operate as a break in the residence, if altogether it has continued for five years.

Looking to the whole scope of this proviso, we think it distinctly intimates that, in the computation to determine whether the pauper is removeable, certain periods of time are to be struck out of the computation for all purposes: and the result is to be arrived at as if these periods of time never had existed; so as to prevent the pauper from taking advantage of them in making up his *five years, and to prevent the parish officers from depriving [*762] him of the status in the parish which he has acquired, by reason of any of the enumerated occurrences, some of which were very likely to happen.

An attempt has been made at the Bar to draw a distinction between imprisonment for felony and imprisonment for misdemeanor or for non-payment of a penalty or of a debt; imprisonment for a felony working a break in the residence, but not the others. It would have been strange if the Legislature had made such a distinction, as there is surely as much reason for enacting that an imprisonment for three years on a conviction for perjury should deprive the person of his irremoveability as an imprisonment of three days for stealing a sixpenny loaf. But the language employed includes all lawful imprisonments in any prison, without distinction of felony, misdemeanor or debt.

With one exception the decisions upon this statute are all

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reconcileable with the view we now take of it. That exception is *Reg.* v. *Salford* (1). There the pauper had been residing in the parish of Salford thirteen years preceding the date of the order of removal, except some months, during which he was imprisoned in the house of correction in another parish under sentence for misdemeanor; and it was held that this imprisonment should be included in the computation in considering whether he had resided in Salford five years next before the application for the warrant, so as to render him removeable.

On further consideration of the statute, we think that sufficient
[*763] effect was not given in that case to the words *"for all purposes"; and its authority is already considerably shaken by the subsequent decision of *Reg.* v. *Holbeck* (2).

Reg. v. *Halifax* (3), *Reg.* v. *Seend* (4), *Reg.* v. *Barnsley* (5) and *Reg.* v. *Caldecote* (6), the cases in which it was held that absence from the parish under an order of removal causes a break in the residence, do not touch the construction of the provision in question, as it does not extend to such an absence. The pauper cannot possibly be considered resident in the parish when he is removed from it by a valid order reciting that he has unlawfully intruded into it; and there is no direction that this absence shall not be taken into the computation; therefore it necessarily makes a break in the residence.

The decision in *Reg.* v. *Pott Shrigley* (7) may be supported on the ground that there the husband of the pauper had been transported. This was an absence from the parish which is not met by the provision about the computation, and therefore is a break in the residence.

Finally, we think that *Reg.* v. *Holbeck* (2) was well decided; for, although there may be difficulty as to a constructive residence in the removing parish while the pauper was lawfully imprisoned in another parish under a conviction in default of payment of a fine, it comes within our present construction of the provision that the time such person shall be a prisoner in a prison shall for all purposes be excluded from the computation.

For these reasons we are of opinion that the order of removal in this case is in violation of the Act of Parliament, and ought to be quashed.

(1) 12 Q. B. 106.
(2) 83 R. R. 513 (16 Q. B. 404).
(3) 76 R. R. 221 (12 Q. B. 111).
(4) 76 R. R. 227 (12 Q. B. 133).
(5) 76 R. R. 254 (12 Q. B. 193).
(6) *Ante*, p. 339.
(7) 76 R. R. 233 (12 Q. B. 143).

REG. *v.* ST. ANDREW, HOLBORN.

In this case the pauper was removed from the parish of Islington to the parish of St. Andrew, Holborn. It is admitted that this is the place of his settlement; and the only question is, whether he was irremoveable by residence under stat. 9 & 10 Vict. c. 66. The Sessions found that he had resided in Islington for upwards of ten years next before the application for the order of removal, excluding a period of three weeks during which he was imprisoned, for misbehaviour in the workhouse, in the house of correction for the county of Middlesex, out of the parish of Islington, from the 2nd of January, 1849; and excluding another period of fourteen days from the 27th of March, 1850, during which he was imprisoned in the same house of correction for the like offence. On the termination of each imprisonment, he immediately returned to, and was received in, the workhouse of the parish of Islington. From this the Sessions inferred that it was always his intention so to return from the time of his committal. [764]

It was contended, in a very learned argument, illustrated by many texts from the Digest, and quotations from Cujacius and other writers on the civil law, that such an imprisonment, according to the just construction of stat. 9 & 10 Vict. c. 66, s. 1, does not operate a break in the residence so as to take away irremoveability, because, not being for a felony, but only for a misdemeanor, it resembles not the deportation of the Roman code, by which civil rights were lost, but relegation, which did not draw along with it any loss of civil rights. We have arrived at the conclusion that the imprisonment does not operate a break by the simpler and safer *process of gathering the intention of the Legislature from the language of the Act of Parliament. For the reasons which we have stated in the preceding case (1), it seems to us that, without the aid of the proviso, the imprisonment would operate a break in the residence, although the conviction was not for felony, and although the pauper, while in prison, always had the intention of returning to Islington; as, during the three weeks and fourteen days, he was by lawful compulsion confined in a prison out of the parish of Islington, and he had no power to return to it till after he had undergone his sentence. Looking merely to residence under the first enactment of the statute, we cannot distinguish this absence from absence under an executed order of removal. [*765]

(1) *Hartfield* v. *Rotherfield*, *ante*, p. 659.

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But the statute, making no provision to exclude from the computation absence under an order of removal, does contain a provision that the time during which the pauper shall be a prisoner in a prison shall for all purposes be excluded from the computation. Therefore, as, excluding the two periods of imprisonment from the computation in this case, the pauper had resided five years in Islington, next before the application for the order of removal, we are of opinion that the order of removal and the order of Sessions confirming it ought to be quashed.

Orders quashed.

1852.
Jan. 13, 26.

[772]

REG. *v.* HAMMOND.

(17 Q. B. 772—784; S. C. 21 L. J. Q. B. 153; 16 Jur. 194.)

On an election of borough councillors under stat. 5 & 6 Will. IV. c. 76, the voting papers, delivered under sect. 32 (1), must state the candidate's place of residence. His place of business, if he do not reside there, is not a place of abode within the meaning of the clause:

Although the business be extensive, and the premises where it is carried on be in the same ward as the residence: and although the proprietor be better known by his place of business than by his place of residence.

And an election by means of voting papers stating only the place of business was held no answer to a *quo warranto* information.

INFORMATION in the nature of a Quo warranto for exercising the office of a councillor of the borough of Great Yarmouth.

Plea. That, on November 1st, 1850, an election of two councillors was held for the Gorleston and Southtown or St. Andrew's Ward in the said borough, one of six wards into which the same was divided under stat. 5 & 6 Will. IV. c. 76: that defendant, being duly qualified &c., was a candidate: that the burgesses entitled to vote did, according to the provisions of the said Act, elect him to be a councillor &c.: and that the presiding alderman and assessors examined the voting papers and ascertained and declared that defendant had a majority of votes and was duly elected: and that

[*773] he subscribed the declaration *required by statute, and accepted the office &c. Verification.

Replication: 1. That the said burgesses in the plea mentioned, entitled &c., did not according to the provisions of the Act elect defendant to be a councillor &c. in manner and form &c. Conclusion to the country. Issue thereon.

2. That the said burgesses who (viz. to the number of 170) voted

(1) Cf. Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sch. III. Pt. 2, r. 5.—A. C.

for defendant to be a councillor, and by whom it is in and by the said plea supposed that he was elected, so voted by delivering, and did deliver, voting papers &c. And that the said voting papers so delivered "did not nor did any of them contain the place of abode of the said William Hammond," being the person for whom the said burgesses voted as aforesaid: And that the said voting papers "contained erroneous, false and untrue statements of the place of abode of the said W. H., and stated as the place of his abode what was not in fact the place of his abode, in this, viz. that the place of abode of the said W. H. was and is in and by the last mentioned voting papers stated to be Church Road, Gorleston, whereas in truth and in fact the place of abode of the said W. H., before and at the time when the said burgesses" did assemble &c., and before and at the time of the delivery of the said voting papers &c., and also at the time of W. H. being as in and by the said plea is supposed elected as aforesaid, "was at High Street in the said borough of Great Yarmouth in the said county of Norfolk, and not at Church Road, Gorleston, aforesaid, or elsewhere than at High Street aforesaid." Averment, "that Church Road, Gorleston, was, before and at the time of the delivery" &c., "and of the said supposed election" &c., "and *still is, situated in the said ward [*774] called the Gorleston and Southtown or St. Andrew's Ward in the said plea mentioned, and that High Street aforesaid was, at the time of the delivery" &c., "and of the said last mentioned election, and still is, situated in the same ward: and that Church Road, Gorleston, aforesaid, was at the time of the delivery" &c., "and of the said last mentioned election, and still is, distant divers, to wit 186, yards from High Street aforesaid: and that Church Road, Gorleston, aforesaid was not then nor is now the same place with or as High Street aforesaid, but then was and still is another and different place." Verification.

Rejoinder. That the said voting papers "did, and every of them did, contain the place of abode of the said W. H., and did, and every of them did, state as the place of abode of the said W. H. what was in fact at the time of the delivery of the said voting papers, and of the said W. H. being elected, as in the said replication mentioned, the place of his abode." Conclusion to the country. Issue thereon.

On the trial, before Pollock, C. B., at the Norfolk Summer Assizes, 1851, it appeared that Hammond carried on an extensive business as a miller at Church Road, Gorleston, but did not

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otherwise reside at the mill, his actual residence being at High Street, Gorleston, the place of residence described in the replication. The voting papers styled him "William Hammond of Church Road, Gorleston, miller." It did not appear that there was any fraud or deception; but it was objected on behalf of the Crown, simply, that the papers were not in the form required by stat. 5 & 6 Will. IV. c. 76, s. 32, which enacts that every burgess entitled &c. [*775] may vote &c. *" by delivering to the mayor and assessors or other presiding officer as hereinafter mentioned a voting paper, containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions." The LORD CHIEF BARON left it to the jury to say whether the defendant was as well known by the description given in the voting papers, naming Church Road, which was his principal place of business, as he would have been by a description naming him as of High Street, Gorleston, where his family residence was. The jury found that he was better known by his place of business than by the place of his actual residence: and, under the direction of his Lordship, they found a verdict for defendant.

Worlledge, in last Michaelmas Term, moved for a new trial on the ground of misdirection. He cited *Reg.* v. *Deighton* (1) and *Allen* v. *Greensill* (2). A rule *nisi* was granted.

O'Malley and *Couch* now showed cause (3):

There are many instances in which the place of business has been held to be the "place of abode" for the purposes of an Act of Parliament or rule of Court, though it was not the place where the party slept: *Haslope* v. *Thorne* (4), *Alexander* v. *Milton* (5), *Roberts* v. *Williams* (6), *Johnson* v. *Lord* (7).

[*776] (LORD CAMPBELL, Ch. J.: The last case is *against you.

COLERIDGE, J.: It is enacted in stat. 5 & 6 Will. IV. c. 76, s. 142 (8), that no "inaccurate description" of place, in any voting paper, "shall hinder the full operation of this Act," "provided that the description of such" "place be such as to be commonly understood.")

(1) 5 Q. B. 896.
(2) 72 R. R. 556 (4 C. B. 100).
(3) Before Lord Campbell, Ch. J., Patteson and Coleridge, JJ. Wightman, J. had left the Court.
(4) 1 M. & S. 103.
(5) 2 Cr. & J. 424; *S. C.* 2 Tyr. 495.
(6) 2 Cr. M. & R. 561; *S. C.* 5 Tyr. 583.
(7) Moo. & Mal. 444.
(8) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 241.

That is not relied upon on behalf of the defendant; for it has been held that the enactment contemplates an inaccurate description of a place admitted to be the right place, not the naming of a place which is said not to be the right (1). The result of the authorities is that "place of abode" in a rule or statute may or may not mean place of residence, according to the intention shown by the context. Under the Uniformity of Process Act (2), 2 & 3 Will. IV. c. 39, s. 12, writs, if sued out by an attorney, are to be indorsed with his "name and place of abode"; if by the party in person, with the name of the city, town, &c. and of the street and the "number of the house of such plaintiff's residence." There the Legislature must have considered that "place of abode" might signify place of business.

(COLERIDGE, J.: Do you say that the words here mean both place of business and place of residence?

LORD CAMPBELL, Ch. J.: You could not say that the place where a man pernoctates is not his place of abode.)

The words must mean the place where he sleeps, as well as the place where he is conversant during the day. "The place where defendant is conversant is sufficient" (by way of addition), "though not commorant, nor inhabitant": Com. Dig. Abatement (F. 25) 4th ed. In *The Southampton Dock Company* v. *Richards* (3) it was objected that the words "agent at the Custom-house," in the Company's register-book, *were not a sufficient compliance with an Act [*777] requiring the "places of abode" to be entered; but the objection did not prevail: and no one would now say in a similar case that a shareholder in a Railway Company was not sufficiently designated by his place of business. Looking to the intention of the Legislature in the Act now in question, what is the object of requiring the place of abode to be stated in the voting papers? Clearly, not to introduce any question as to qualification, an inquiry which the returning officers cannot enter into, but to identify, by a clear designation, the person for whom the burgess tendering the paper desires to vote. * * *

Worlledge, contrà: [778]

It may be conceded that, under some statutes, the expression

(1) See *Reg.* v. *Coward*, 16 Q. B. 819.
(2) Repealed by 42 & 43 Vict. c. 59.
(3) 56 R. R. 436 (1 Man. & G. 448).

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"place of abode" has two meanings: but in stat. 5 & 6 Will. IV. c. 76, s. 32, it can mean only the place of residence. That clause requires different modes of designation for the candidate and for the voter. The voting paper is to contain the names of the candidates voted for, "with their respective places of abode and [*779] descriptions"; the burgess is to sign with the *name, not of his place of abode, but of "the street, lane, or other place in which the property for which he appears to be rated on the burgess roll is situated."

(LORD CAMPBELL, Ch. J.: The object in one case being to show the qualification, in the other who is meant as the candidate.)

Sect. 9 requires three qualifications in the burgess, without which he cannot, under sect. 28, be a voter; occupation of property, inhabitancy, and the being rated: and the notice of claim to be on the burgess list, Schedule (D.) No. 2, is to specify three things: "that I occupy (here describe the house, warehouse, counting-house, or shop then occupied by the claimant) in the borough, and that I have been rated" &c.: with a signature as follows: "JOHN ALLEN of (place of abode)." "Place of abode" there must mean something different from "warehouse, counting-house, or shop," if both are not part of the same premises. By No. 3 of the same schedule, the party giving notice of objection must add to his signature "the place of abode and property" (the form treating them as distinct) "for which he is said to be rated in the burgess list." The expression "place of abode" occurs in other parts of this Act, and, in two at least (sects. 121, 127), seems evidently to denote the place of residence. The report of *Reg.* v. *Deighton* (1) in Davison & Merivale shows that the place mentioned in the voting papers in connexion with the defendant's name appeared by the record to be his place of business; if this satisfied the statute, judgment ought to have been given for the defendant.

(COLERIDGE, J.: The case was decided without reference to this question.)

[*780] In *Luckett* v. *Knowles* (2), under a *statute germane to this (6 & 7 Vict. c. 18), MAULE, J. refused to admit that a voter's "place of abode is part and parcel of the qualification," adding: "The party may have resided in several places: it clearly would not be

(1) 5 Q. B. 896; 1 Dav. & Mer. 682. (2) 69 R. R. 466 (2 C. B. 187).

necessary to insert them all in the register." *Allen* v. *Greensill* (1) is another applicable case under the same statute.

(LORD CAMPBELL, Ch. J.: There does not appear to be any express decision upon the enactment now before us.)

By sect. 101 of stat. 6 & 7 Vict. c. 18, notices may be served upon an overseer "at his place of abode, or at his office or other place for transacting parochial business."

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a later day of the Term (January 26th), delivered the judgment of the COURT:

In this case we are required to put a construction on the words "places of abode," in the 32nd (2) section of stat. 5 & 6 Will. IV. c. 76, which enacts that "every burgess entitled to vote in the election of councillors may vote for any number of persons not exceeding the number of councillors then to be chosen, by delivering to the mayor and assessors" "a voting paper, containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions."

At the time of the election in question of town councillors for the borough of Great Yarmouth, the defendant resided with his family in High Street, and he carried on the business of a miller in Church Road, having a mill there. His place of residence and place of business are both in the parish of Gorleston, and within *the limits [*781] of the borough of Great Yarmouth. A certain number of the voting papers for him described him as "William Hammond of Church Road, Gorleston, miller." If his place of abode is properly stated in these voting papers according to the Act of Parliament, he was duly elected a councillor: but otherwise he was not, and the verdict in his favour must be set aside.

After an attentive consideration of the Act of Parliament, we are of opinion that by place of abode it means the place of residence of the candidate. Such is the usual meaning of this expression. In Johnson's Dictionary "abode" is defined to be "habitation, dwelling, place of residence;" and "residence" is defined to be "place of abode; dwelling." A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full

(1) 72 R. R. 556 (4 C. B. 100).

(2) See now provisions as to nomination papers in Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sch. III. Pt. 2, r. 5.

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sense of that expression; and, if this be stated to be his place of abode, no doubt nor difficulty can occur. In some instances he may be quite as well known if described of the place where he carries on his business; but this is never his place of abode in the ordinary sense of the expression; and he may have a place of business to which he goes very rarely, and which may be known to few as belonging to him.

It was urged that the object of this enactment was to designate the individual for whom the vote is given, by requiring the voting paper, along with his name and surname and description, to contain his place of abode: but surely this does not show that his place of business may be stated instead of his place of residence; for, the place of residence being mentioned, no doubt can exist as to the individual for whom the vote is intended to be given. The defendant's counsel did not venture to contend that a statement of

[*782] the place of residence would *not be sufficient. They must therefore say that a choice is given to state in the voting paper either the residence of the candidate or his place of business, and, if he has several places of business, any one of them which the different voters may think fit to select. But this latitude might lead to confusion and errors in summing up the votes; and the object of the Legislature, as contended for on the part of the defendant, will be more effectually gained by considering that the language employed is used in the ordinary sense.

Wherever the expression "place of abode" occurs in this Act of Parliament, it will be satisfied by the meaning of place of residence; and in some places where it occurs, as in sections 121 and 127, and in Schedule (D.) No. 2, referred to by section 17, it will admit of no other meaning. We are bound to suppose that it is used in the same sense throughout the whole statute.

Reg. v. *Deighton* (1) was relied upon by the counsel for the relator as an express decision upon the meaning of the expression "place of abode" in this section of the Act of Parliament: but there the rejoinder admitted that the defendant's place of abode had not been truly stated in the voting papers, and merely averred that he was so described in the voting papers without any fraud, and that the description so given of him was as well known as if his place of abode had been mentioned. The judgment of the COURT against him proceeded upon the ground that his place of abode had not been mentioned in the voting papers; and the Court did not there

(1) 5 Q. B. 896.

decide that his place of business could not be considered his place of abode.

[783]

On the part of the defendant reliance was placed on *Roberts* v. *Williams* (1). That case turned on the statute 24 Geo. II. c. 44, which requires notice of action to be indorsed with the name of the attorney intending to sue out process "together with the place of his abode." The COURT held that an indorsement stating the attorney's place of business was sufficient within that Act: principally, it appears, because the information intended to be furnished under that Act was the place where the attorney, as such and acting in such character, was to be found; and the decision is manifestly inapplicable to the case of the abode of an individual, merely as such, independent of any profession or business. The defendant's counsel likewise referred to the cases in which it has been held that an affidavit describing the deponent of his place of business is enough where by rule of Court he should be described as of his place of abode. These cases only prove that, for some purposes, place of residence may be the place of abode; and they are of little use to show the meaning to be given to the words in the Municipal Corporation Act. There is however a statute *in pari materiâ*, the Registration of Voters' Act, 6 & 7 Vict. c. 18; and, in construing this Act, the learned Judges of the Court of Common Pleas seem to have been of opinion that where it uses the words "place of abode" it means place of residence: *Luckett* v. *Knowles* (2), *Allen* v. *Greensill* (3).

We have been much pressed by the fact in the present case that the defendant was as well known by his place of business as by his place of residence: but, if we were *to hold that the place of business is sufficient, we must lay down a general rule upon the subject, which, if unqualified, would in many instances defeat the object of the Legislature, and, if qualified with the condition that the candidate is as well known by his place of business as by his place of residence, might lead to great uncertainty and much litigation. We think it the safer and better course to conclude that the Legislature used the words in their plain and ordinary sense, and required that the voting paper shall contain the candidate's place of residence, by which in all cases he may easily be identified.

[*784]

For these reasons we think that the verdict for the defendant must be set aside, and the rule for a new trial made absolute.

Rule absolute.

(1) 2 Cr. M. & R. 561; *S. C.* 5 Tyr. 583.

(2) 69 R. R. 466 (2 C. B. 187).

(3) 72 R. R. 556 (4 C. B. 100).

1852.
Jan. 19.

[785]

HALL *v.* DYSON (1).

(17 Q. B. 785—793; S. C. 21 L. J. Q. B. 224; 16 Jur. 270.)

An agreement by the attorney of an insolvent with one of the creditors, who has given notice of opposition to the insolvent's discharge, to pay the creditor a certain sum of money in consideration that he will withdraw his opposition, is void; such consideration being contrary to the policy of the Insolvent Debtors' Act, and a fraud upon the other creditors.

Although it do not appear that the money is to be paid out of the insolvent's funds.

ASSUMPSIT. The declaration stated that, before and at the time of the undertaking and promise of defendant thereinafter mentioned, one David Bryan was indebted to plaintiff in 400*l.*; that the said D. B. then was a prisoner for debt in actual custody in York Castle, and had applied by petition in a summary way to the Court for Relief of Insolvent Debtors in England for his discharge from custody, according to the provisions then in force for the relief of insolvent debtors in England; that thereupon the said petition was, before the said undertaking &c. of defendant, duly referred to the county court of York for the hearing thereof; that the said application of D. B. for his discharge as aforesaid was pending as aforesaid and undetermined before and at the time of the said undertaking &c.; that plaintiff had before then threatened to oppose, and was then about to oppose, the discharge of D. B. upon such application; and that thereupon afterwards, to wit on &c., in consideration that plaintiff would withdraw his opposition to the discharge of D. B. upon such application, defendant undertook and then promised plaintiff that he, defendant, would pay 50*l.* to plaintiff, through his agent Arthur Wright, on 31st May, 1851. That, after the making of the said undertaking and promise of defendant, to wit on &c., the said application of D. B. was duly heard and determined by the Judge of the said county court; that plaintiff,

[*786] confiding &c., did, from and *after the time of the said undertaking and promise hitherto, altogether cease and withdraw his opposition to the discharge of D. B. upon such application, and did not at any time or in any manner oppose or attempt to oppose the said application; that the time for opposing the said discharge elapsed long before the commencement of this suit, to wit when the said application was heard and determined as aforesaid; of all which premises defendant had notice: yet defendant did not nor would, on 31st May,

(1) Cited, *M'Keevan* v. *Sanderson* (1875) L. R. 20 Eq. 65, 74; *Lound* v. *Grimwade* (1888) 39 Ch. D. 605, 613, 57 L. J. Ch. 725; *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742, 745, 59 L. J. Q. B. 288; dist. *Re M'Henry, Ex parte Levita* [1894] 3 Ch. 365, 64 L. J. Ch. 13.—A. C.

HALL v. DYSON.

1851, or at any time before or since, although often requested so to do, pay the said 50*l.* or any part thereof to plaintiff through his agent the said A. W., or to plaintiff, or in any other manner, but wrongfully neglected and refused so to do.

Fourth plea: That, before and at the time of the said undertaking and promise, to wit on &c., the said David Bryan was indebted to plaintiff as in the declaration mentioned, and also to divers other persons, to wit &c., in divers other sums of money amounting in the whole to a large sum of money, to wit &c.; and defendant further saith that the said undertaking and promise was made and plaintiff's opposition withdrawn, as in the declaration mentioned, without the leave and licence, privity or consent, and in fraud, of the said other creditors of the said D. B., and without the privity or consent of the said D. B., and without the privity or consent of the said Judge of the said county court. Verification.

Replication to fourth plea: That the said undertaking and promise was not made, nor the said opposition withdrawn, in fraud of the said other creditors, or any or either of them, in manner and form &c. Issue thereon.

On the trial, before Maule, J., at the Northamptonshire Summer Assizes, 1851, it appeared that Byran, on 26th *May, 1851, [*787] being then a prisoner for debt in York Castle, petitioned for his discharge under the Insolvent Debtors' Act (1). The usual notices were given to the creditors; and Bryan shortly afterwards received notice of opposition from the plaintiff, one of his creditors. Before the case came on for hearing in the county court, defendant, who was Bryan's attorney, gave to Wright, the plaintiff's agent, the following memorandum:

"Memorandum.

"In consideration of Mr. Matthew Hall withdrawing the opposition in the case of David Bryan, now a prisoner in York Castle, I, Henry William Dyson, undertake to pay the sum of fifty pounds to the said Matthew Hall through his agent Arthur Wright, to be paid on Saturday next.

"HENRY WM. DYSON (Solr.) York.

"Signed May 26th, 1851."

Wright had previously given to defendant the following document:

(1) Stat. 1 & 2 Vict. c. 110.

HALL v. DYSON.

"In the Court for Relief of Insolvent Debtors.

"In the matter of the petition of David Bryan, an insolvent debtor.

"I undertake and consent to the withdrawal of opposition on behalf of Mr. Hall on payment of the sum of fifty pounds to me. Dated this 26th day of May, 1851.

"(Pro MATTHEW HALL.)

"ARTHUR WRIGHT."

The jury found a verdict for the plaintiff, leave being reserved
[*788] to move to enter a nonsuit. *Miller*, Serjt., in *Michaelmas Term, 1851, obtained a rule *nisi* for a nonsuit, or arrest of judgment.

Humfrey and *Sir J. E. Eardley Wilmot* now showed cause:

On the motion for a nonsuit, the question for the Court is, whether the learned Judge should have directed the jury that the arrangement proved between the defendant and the plaintiff was void for illegality. [They referred to *Murray* v. *Reeves* (1) and *Gould* v. *Williams* (2)] It cannot be denied that a creditor may withdraw his opposition, if the other creditors are not injured by his doing so.

(LORD CAMPBELL, Ch. J.: But it may be illegal to take money for so withdrawing.)

That question would turn upon the express words of the Act. In *Taylor* v. *Wilson* (3) it was held that a security given by a bankrupt
[*789] to a creditor, in consideration of his forbearing *to oppose the bankrupt on his last examination, is not void under stat. 12 & 13 Vict. c. 106, s. 202 (4), although it would have been void if given in consideration of the forbearing to oppose the allowance of the certificate. That case shows how strictly clauses of this kind are to be construed.

(LORD CAMPBELL, Ch. J.: Suppose a creditor withdrew, for a pecuniary consideration, from an opposition which proceeded upon the ground of fraudulent concealment by the debtor?)

It is difficult to say that a creditor could be forced to oppose, even under such circumstances.

(1) 32 R. R. 430 (8 B. & C. 421).
(2) 4 Dowl. P. C. 91.
(3) 5 Ex. 251.
(4) Repealed by 32 & 33 Vict. c. 83. s. 20.—A. C.

(LORD CAMPBELL, Ch. J.: A voter has a perfect right to stay away from the poll: that does not make it legal for him to receive money for staying away.)

Simpson v. *Lord Howden* (1) is an authority to show that what a man may do legally, he may take money for doing. In *Jones* v. *Waite* (2) ALDERSON, B. says: "why should not the doing what is legal be a good consideration?"

(PATTESON, J.: In *Taylor* v. *Wilson* (3) the security in consideration of which the opposition was withdrawn was held by an innocent indorsee.)

That would not prevent the security from becoming absolutely "void," under sect. 202, if it were at first given contrary to the statute. But, in fact, a creditor is in no way bound to oppose an insolvent. His opposition is not even a duty of imperfect obligation: it is a privilege which he may exercise or not as he thinks fit. Stat. 1 & 2 Vict. c. 110, s. 72 (4), provides only that "it shall be lawful" for creditors to oppose.

As to that part of the motion which is in arrest of judgment, the facts upon the record are, in legal effect, the same as those proved at the trial: it is not, therefore, necessary to add anything on that point. [790]

Miller, Serjt. (with whom was *G. Hayes*), *contrà*:

The plaintiff's agreement is clearly in fraud of the other creditors, and to their detriment; and such an agreement is void at common law. *Nerot* v. *Wallace* (5) and *Murray* v. *Reeves* (6) are in point. The observations of all the Judges in the former case, that such agreements are contrary to the policy of the bankrupt laws, and create precedents which may be used for corrupt and fraudulent purposes, apply equally to the present case. It would be most dangerous to hold that a creditor is always at liberty to withdraw his opposition. The discharge of an insolvent sends him into the

(1) 50 R. R. 575 (9 Cl. & Fin. 61), in Dom. Proc. affirming the judgment of Ex. Ch. in *Lord Howden* v. *Simpson*, 50 R. R. 555 (10 Ad. & El. 807), which reversed the judgment of Q. B. in *Lord Howden* v. *Simpson*, 10 Ad. & El. 793.

(2) 50 R. R. 705 (5 Bing. N. C. 341, 347, in Ex. Ch.), affirming the judgment of C. B. in *Waite* v. *Jones*, 1 Bing. N. C. 656. Judgment of Ex. Ch. affirmed in Dom. Proc.: *Jones* v. *Waite*, 50 R. R. 717 (9 Cl. & Fin. 88).

(3) 5 Ex. 251.

(4) Repealed by 32 & 33 Vict. c. 83, s. 20.—A. C.

(5) 3 T. R. 17.

(6) 32 R. R. 430 (8 B. & C. 421)

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world with a fresh credit, on the assumption that a proper investigation into his conduct and his liabilities has taken place: the withdrawing of opposition by a creditor would often obstruct or altogether prevent such investigation, and inflict an injury upon the creditors and upon the public. In *Kaye* v. *Bolton* (1) it was held that a covenant by a friend of a bankrupt to pay all the bankrupt's debts in full, in consideration that the creditors would proceed no further under the commission, was valid; but there the creditors were not only not injured, but benefited by the arrangement. Lord KENYON expresses himself to that effect in the judgment; and LAWRENCE, J. distinguishes the case from *Nerot* [*791] v. *Wallace* (2). Here other creditors may not *have opposed, because they knew that they could avail themselves of the plaintiff's opposition: in that case the withdrawing of that opposition is an injury to them. As to the argument that an agreement of this kind is not immoral, because a creditor is not obliged to oppose, the answer is, that it becomes immoral when he agrees to take money for exercising his discretion. (He was then stopped by the COURT.)

LORD CAMPBELL, Ch. J.:

This rule must be made absolute. There is no doubt that the plaintiff might have withdrawn his opposition, if he chose; but he had no right to agree to do so in consideration of receiving money. When *Simpson* v. *Lord Howden* (3), which has been cited for the plaintiff, was before the House of Lords, I concurred with the rest of their Lordships in holding the agreement which was the subject of dispute to be valid: but we did so on the ground that there was nothing in the agreement itself to show that it was necessarily of an illegal character, or in fraud of the public. In the present case, the creditor is, as it were, bought off; and he was under a moral obligation to continue his opposition, inasmuch as, by giving notice of it, he had led the other creditors to believe that he really intended to oppose. The consequence of his withdrawing is that justice is disappointed, because the adjudication is made without the proper investigation having taken place. It seems to me that the consideration for receiving the money, which is, to withdraw his opposition, and that after having given notice of it, is clearly [*792] immoral. *Murray* v. *Reeves* (4) was not so strong *a case as this,

(1) 6 T. R. 134.
(2) 3 T. R. 17.
(3) 50 R. R. 575 (9 Cl. & Fin. 61).
(4) 32 R. R. 430 (8 B. & C. 421).

although the agreement there was still pronounced to be invalid; for there the money in consideration of which the agreement was made was to be paid to the plaintiff as assignee of the bankrupt. *Taylor* v. *Wilson* (1) is no authority: in that case the question turned upon the language of the particular statute.

PATTESON, J.:

I am of the same opinion. This is an action between the immediate parties to the agreement, and therefore the case differs from *Taylor* v. *Wilson* (1), where the defendant was an innocent indorsee of the security which was the subject of the action. The agreement here is clearly illegal, not only upon the face of it, but because it is manifest that a fraud was committed upon the other creditors. The case of *Gould* v. *Williams* (2) I consider to have been decided upon the principle which should govern cases of this kind. And, upon that principle, I think that the agreement in question is illegal, inasmuch as it is contrary to the policy of the Insolvent Debtors' Act, and amounts, moreover, to a fraud on the other creditors. The duty of opposition on the part of the creditor may be a duty only of imperfect obligation: but, if he has the option of pursuing one course or the other, it is an immoral act, against the policy of the law, and a fraud upon the other creditors, to take money for exercising that option.

COLERIDGE, J.:

I am of the same opinion. *Murray* v. *Reeves* (3) was, I think, properly decided: and upon the authority of that case the agreement here is void, the *consideration for it being illegal, inasmuch [*793] as it amounts to a fraud upon the other creditors. No doubt the duty of opposition on the part of a creditor is a duty of imperfect obligation: but here the plaintiff seeks to make the non-fulfilment of that obligation the ground of the contract upon which he sues. That is a contract which the Court cannot recognize.

Rule absolute for a nonsuit (4).

(1) 5 Ex. 251.
(2) 4 Dowl. P. C. 91.
(3) 32 R. R. 430 (8 B. & C. 421).
(4) Wightman, J. was absent.

1852.
Jan. 22.

[828]

BURMESTER *v.* BARRON (1).

(17 Q. B. 828—832 ; S. C. 21 L. J. Q. B. 135 ; 16 Jur. 314.)

A bill was drawn, dated "London," but not otherwise giving the address of the drawer. It was directed to, and accepted by, "Captain Barron, 27, Saville Row." In an action by an indorsee against the drawer, issue on a plea denying notice of dishonour, the plaintiff proved that he had put a letter into the post, addressed to the drawer, "London." The drawer gave evidence that he had not received the letter; that he was a clerk in the Admiralty and lived at Chelsea, and that this might have been ascertained by enquiry of the acceptor, who was his brother. No such enquiry had been made:

Held that, in an action against the drawer, the fact that the holder had sent a letter to the defendant, addressed as he had dated the bill, was evidence on which a jury would be warranted in finding that due diligence had been used to give notice of dishonour, though no enquiry had been made of the acceptor.

ASSUMPSIT by indorsee against drawer of a bill of exchange. The count averred due notice of dishonour. Plea, denying such notice. Issue thereon.

On the trial, before Wightman, J., at the London sittings in this Term, the bill was produced. It purported to be dated "London," drawn by J. M. Barron (the defendant) on "Captain Barron,
[*829] 27, Saville Row," and *accepted by him. The alleged notice of dishonour was given by a letter which was put into the post with the address "J. M. Barron, Esq., London." It did not appear that any enquiry had been made at Saville Row. The defendant was called as a witness, and denied receipt of the notice: and he said: "I am a clerk in the Admiralty, and live at Chelsea. Captain Barron is my brother. Had enquiry been made at Saville Row, my residence would have been discovered, and that I was a clerk in the Admiralty." Counsel for the defendant objected that there was no evidence for the jury on the plaintiff's side of the issue as to notice. The plaintiff's counsel cited *Clarke* v. *Sharpe* (2). The learned Judge left the case to the jury; and they found for the plaintiffs: but leave was reserved to move for a nonsuit, or verdict for defendant.

Montague Chambers now moved accordingly:

Clarke v. *Sharpe* (2) differs from this case. There the evidence was merely that the bill, drawn by the defendant H. B. Sharpe, was dated London, and that the notice of dishonour was addressed "Mr. H. B. Sharpe, London": and there was no evidence that the letter had or had not reached the defendant: *Mann* v. *Moors* (3)

(1) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (15).

(2) 49 R. R. 556 (3 M. & W. 166).

(3) Ry. & M. 249.

was cited. The Court of Exchequer held that there was evidence to go to the jury of notice. PARKE, B. said: "The only question is, whether this was not evidence to go to the jury that the letter reached the defendant in due course. On that point we have the direct authority of Lord TENTERDEN. It is a strong argument, that, if the post-office could not find Mr. Sharpe, enquiry would not have found him." *But here it was in evidence that enquiry, at a specified place, and that pointed out by the bill, would have found the defendant.

[*830]

(WIGHTMAN, J.: Suppose a place is pointed out for enquiry, which is very distant.

LORD CAMPBELL, Ch. J.: Do you impose upon the holder the necessity of always applying to the acceptor to know the drawer's residence?)

Not in all cases; but there should be reasonable diligence. It rarely happens that the drawer gives a special address.

(WIGHTMAN, J.: There is no question that in this case the letter did not reach the defendant; and that a letter, posted as this was, would not be likely to reach him.

LORD CAMPBELL, Ch. J.: Do you admit that it was a question for the jury whether the notice reached him or not?)

Taking it to be so, there was not, here, any evidence for the jury.

(LORD CAMPBELL, Ch. J.: Then I think you are out of Court. You might have called upon the Judge to leave the question to the jury whether or not due diligence had been used. But, if you had, I think it cannot be doubted that they would have found for the plaintiff. It could not be expected that the holder should go all over London to make enquiries.)

The rule undoubtedly is, as laid down in Bayley on Bills, 281, 6th ed. (citing *Bateman* v. *Joseph* (1)), that, "where it is not known where a party lives, due diligence must in general be used to find out." Here no evidence of due diligence was given.

(LORD CAMPBELL, Ch. J.: If the drawer's address here had been Dorking instead of London, there would have been less doubt in the

(1) 11 R. R. 443 (12 East, 433).

BURMESTER v. BARRON. case. But there are persons whom a letter directed only "London" will reach.)

Beveridge v. *Burgis* (1) is another authority cited in the passage of Bayley on Bills just referred to.

[831] (LORD CAMPBELL, Ch. J.: There no notice at all was sent.)

If the letter in this case had been sent by a private messenger, who had not found the defendant, it would be clear that enough had not been done. The post-office has more advantages; and, if nothing appeared but that a letter, addressed as in this case, had been put into the box, there might be a *primâ facie* presumption that it had reached the party. But here that presumption is excluded; and means are shown by which a right delivery of the letter might have been ensured. The case is novel in its facts.

LORD CAMPBELL, Ch. J.:

There is no ground for this motion. It is not necessary to lay down as a rule of law that such a notice as this, under such circumstances, is conclusively good. But, if the Judge, here, had been asked to leave to the jury the question whether or not due diligence had been used, he ought to have done so; and on that point there was abundant evidence. The drawer gives the address "London," on his bill; the holder puts into the post a letter so addressed. That is evidence of due diligence. He has done all that the drawer required of him. In fact the drawer in this case had given a false statement as to his residence, as he lived at Chelsea. The step taken by the holder does not cease to be due diligence (or evidence of due diligence) because he might have gone to the acceptor. I cannot, therefore, say that the learned Judge ought to have nonsuited in this case; for, if he had asked the jury whether there was due diligence, I do not doubt that they would have said there was; and there was evidence which would have abundantly justified them in so finding.

[832] PATTESON, J.:

It is clear that there ought not to have been a nonsuit in this case. According to *Clarke* v. *Sharpe* (2), if a bill is drawn with the address "London," there is evidence of notice, as against the drawer, if a notice of dishonour has been put into the post addressed as the bill is dated. I do not say that it would be sufficient as against a subsequent indorser. If there was any question for the

(1) 13 R. R. 798 (3 Camp. 262). (2) 49 R. R. 556 (3 M. & W. 166).

jury as to due diligence, the Judge should have been required to leave it to them: but I am of opinion that there was due diligence. The decision in *Clarke* v. *Sharpe* (1) was founded upon an earlier one to the same effect (2). If the argument for the defendant were good, a trap might always be laid for the holder of a bill, by giving the date "London," and then saying "you might have found by enquiry that I live somewhere else."

COLERIDGE, J.:

In an action between holder and drawer, this evidence was sufficient. *Primâ facie*, here, "London" was the place where the drawer was to be found. He is not entitled to say "If you had enquired somewhere else you would have been told where I was to be met with."

WIGHTMAN, J.:

If I had been desired, I should have left the question of due diligence to the jury; but I should have stated to them also that the drawer, by giving the date "London," might have induced the holder to believe that a letter so addressed would reach him.

Rule refused.

THE MARQUIS OF SALISBURY *v.* THE GREAT NORTHERN RAILWAY COMPANY (3).

1852. *Jan.* 20.

(17 Q. B. 840—858; S. C. 21 L. J. Q. B. 185; 16 Jur. 740.)

[840]

Notice by a Railway Company to a landowner, under sect. 18 of the Lands Clauses Consolidation Act, 1845, requiring the lands for the purposes of the Company, is a sufficient exercise of the powers of compulsory purchase given by that Act to place the Company and the landowner in the position of purchaser and vendor: and entry by the Company upon the lands, after the previous steps prescribed by sect. 85 have been taken, is not an exercise of the Company's powers of compulsory purchase, but an act which is made legal by the previous exercise of those compulsory powers, and need not, therefore, be done within the period prescribed by sect. 123.

BY an order of Vice-Chancellor KNIGHT BRUCE, a special case was stated for the opinion of this Court. The material statements were as follows.

(1) 49 R. R. 556 (3 M. & W. 166).
(2) *Mann* v. *Moors*, Ry. & M. 249.
(3) Cited, *Tiverton and North Devon Ry. Co.* v. *Loosemore* (1884) 9 App. Cas. 480, 488, 495, 510, 516, 53 L. J. Ch. 812; *G. W. Ry. Co.* v. *Swindon and Cheltenham Ry. Co.* (1884) 9 App. Cas. 787, 803, 806, 53 L. J. Ch. 1075; *Mercer* v. *Liverpool, &c. Ry. Co.* [1903] 1 K. B. 652, 661, 72 L. J. K. B. 128, 88 L. T. 374, C.A.

MARQUIS OF SALISBURY v. GREAT NORTHERN RAILWAY COMPANY.

[841]

The plaintiff, for many years, has been, and still is, seised for life of certain lands situate in the parish of Hatfield, in the county of Herts, part of which consists of 1a. 3r. 1p., hereinafter particularly described, subject only to a tenancy from year to year by the tenants or farmers of the plaintiff; and the plaintiff never had any greater estate than an estate for life in the same hereditaments.

The case then stated that, by the Great Northern Railway Act, 1846 (1) (Royal assent 26th June), the Great Northern Railway Company, the defendants, were incorporated for the purposes in the said Act mentioned; and The Lands and Railways Clauses Consolidation Acts, 1845, are incorporated therewith (2). By sect. 27 of the said Great Northern Railway Act it was enacted "that the powers of the said Company for the compulsory purchase of lands for the purposes of" the said Act "shall not be exercised after the expiration of five years from the passing of" that Act; and no other provision is made in that Act, limiting the time for compulsory taking or purchase of lands. The said Company have not obtained an extension of time for the purchase by them of the said 1a. 3r. 1p. of land, or any part thereof, pursuant to stat. 11 & 12 Vict. c. 3.

[*842]

On 21st May, 1851, the Great Northern Railway Company gave the plaintiff a notice in writing of that *date: whereby they required to purchase and take, for the purpose of the said Railway, the land described in the schedule and plan thereunto annexed. The case further stated that the notice called upon the plaintiff before the expiration of twenty-one days to deliver to Messrs. Baxter, Rose and Norton (the Company's solicitors) a statement, in writing, of the sum which he was willing to receive in satisfaction and compensation for the value of such land; and that the schedule described the said land (being that part of the plaintiff's land hereinbefore mentioned) as All those pieces or parcels of land, &c., delineated on the plan thereto annexed, as the same were then or were about to be staked or set or otherwise marked out for the purpose of the before mentioned Railway, containing together by admeasurement 1a. 3r. 1p., situate &c., and then or late in the occupation &c. And that the hereditaments &c. above described

(1) 9 & 10 Vict. c. lxxi. (local and personal, public), "For making a railway from London to York, with branches therefrom providing for the counties of Hertford, Bedford, Huntingdon, Northampton, Rutland, Nottingham, and the three divisions of the county of Lincoln a railway communication with London and York, to be called 'The Great Northern Railway.'"

(2) Sect. 1.

were admitted to be parcel of certain lands &c. delineated in the Parliamentary plan, and described in the book of reference thereto, deposited by the promoters of the London and York Railway Company, afterwards incorporated under the title of the Great Northern Railway Company, with the clerk of the peace for the county of Hertford, and in such plan and book distinguished by Nos. 136 and 143 &c.

The case then stated that, on 26th May, 1851, the plaintiff's solicitor, by letter to the solicitors of the Company, offered to accept 600*l.* as the price for the said lands; which offer was, on the part of the said Company, declined: and thereupon the Company proceeded to adopt measures for obtaining possession of the said lands, pursuant to the 84th and 85th sections *of the Lands [*843] Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). That, on 18th June, 1851, they applied to two justices to appoint a surveyor, to determine the value of the said land: and they appointed a surveyor, who valued the same at 158*l.*: that, on 23rd June, 1851, the Company deposited 158*l.* in the Bank of England, in the name &c. of the Accountant-General, to the credit of the plaintiff, which sum still remains so deposited: and that, on the following day, the defendants delivered to the plaintiff a bond, as prescribed by sect. 85.

The Company have taken no other measures towards the purchase of the said land save as herein stated; and they took no measures for obtaining possession of the land within three years from the passing of the said special Act.

On 21st May, 1851, the Company served a notice in writing of that date on Frederick Farr and John Farr, the tenants or occupiers of the plaintiff's said land, who hold the same as yearly tenants to the plaintiff, similar to the aforesaid notice served on the plaintiff. The case proceeded to state that, on 18th June, 1851, the defendants and the said F. F. and J. F. disagreeing on the amount of compensation, the defendants caused them to be summoned to appear before two justices of the peace &c. at &c., in order that the said justices might determine the amount: and ultimately, on 8th July, 1851, the said justices awarded to the said F. F. and J. F. 25*l.* as compensation for their interest as tenants of the said land; that defendants thereupon tendered the said sum, which F. F. and J. F. refused to receive; and consequently they have not received the same, or any other compensation from the defendants

MARQUIS OF SALISBURY v. GREAT NORTHERN RAILWAY COMPANY.

[844]

In the same month of July, the Company threatened to enter upon and use the plaintiff's said land without the consent or permission of the plaintiff, or his solicitors or agents, but did not enter upon the same; and the plaintiff thereupon, on 19th July, 1851, filed his bill of complaint in the Court of Chancery against the said Company, praying for an injunction to restrain them from entering upon or taking possession of plaintiff's said land, and from digging for gravel or committing any other act of waste or spoil thereon.

On 4th August, 1851, a motion was made in the said cause, before Sir J. L. K. Bruce, V.-C., for an injunction according to the prayer of the bill; whereupon it was ordered (among other things) that a case should be made for the opinion of the Judges of the Court of Queen's Bench: and the question was to be, Whether the defendants, under the circumstances before stated, have, or had in the month of July last, the right to take the lands comprised in the notice to treat, dated the 21st May last, in the plaintiff's bill mentioned.

The case was now argued by

Bramwell, for the plaintiff:

Sect. 27 of the Company's Act declares that their powers for the compulsory purchase of lands for the purposes of the Act (which powers are, by sect. 1, the same as those given by the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18) shall not be exercised after the expiration of five years from the passing of the Act. The Company, therefore, have no right to enter upon the plaintiff's land, inasmuch as they have not exercised their compulsory powers within the prescribed period. All that they have done has been

[*845]

to give a *notice to the plaintiff that they required the land, and, upon his differing with them as to the price, to have the land valued, and to deposit a sum of money and enter into a bond, as prescribed by sects. 85, 86 of stat. 8 & 9 Vict. c. 18.

(PATTESON, J.: In *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (1) we held that a Company who had taken these steps, and entered upon the land, could not be considered as trespassers.)

Here there has been no entry by the Company; and it is clear, from the judgment in *Doe* d. *Armitstead* v. *North Staffordshire*

(1) 83 R. R. 577 (16 Q. B. 526).

Railway Company (1), that the COURT considered the entry as necessary in order to make the steps to be taken by the Company under sects. 85, 86 complete, so as to give power to the landowner to initiate proceedings under sect. 68. In *Adams* v. *The London and Blackwall Railway Company* (2) and *Worsley* v. *South Devon Railway Company* (3) the COURT took the same view. And in *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (4) it was held that the word "taken," in sect. 68, when used with reference to the occupation of land by the Company under sects. 85, 86, must be understood as applying only to an actual entry and taking, and not to a mere constructive possession, by the Company. It will be contended that the notice to treat operates as a contract: but it does not amount to a contract which binds both parties.

(COLERIDGE, J.: In *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (5) the Court of Exchequer held that both parties were bound finally.

LORD CAMPBELL, Ch. J.: In *Brocklebank* v. *Whitehaven Junction Railway Company* (6) Vice-Chancellor SHADWELL and Lord COTTENHAM seemed to have held opposite opinions on this point.) [*846]

In a later case, *Kinnersley* v. *The North Staffordshire Railway Company* (7) Vice-Chancellor SHADWELL held that the notice to treat did not operate as a final contract. The Company, in giving their notice, give an implied pledge to abide by it; and they are, no doubt, bound by that notice; but the landowner is not. The language of sects. 85, 86, is in favour of this view. It cannot be contended that, after the notice has been given, and the steps prescribed by these sections have been taken, the land has virtually been sold by the owner to the Company. A court of equity would not enforce the specific performance of such a sale *Adams* v. *The London and Blackwall Railway Company* (2). In fact, the notice is not part of the compulsory proceedings at all, though it is a necessary preliminary step to such compulsory proceedings.

(1) 83 R. R. 583 (16 Q. B. 534).
(2) 2 Mac. & G. 118, 126.
(3) 83 R. R. 587, 591 (16 Q. B. 539, 544).
(4) 82 R. R. 732 (5 Ex. 475).
(5) 82 R. R. 740 (5 Ex. 486, 487).
(6) 15 Sim. 632.
(7) 13 L. T. 340.

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(COLERIDGE, J.: Could the landowner, after the notice, give a good title to a third party?)

Probably not.

(COLERIDGE, J.: What do you say is the first step in the compulsory proceedings?)

The delivery of a warrant to the sheriff for a jury.

(LORD CAMPBELL, Ch. J.: The Company gives the landowner notice to treat, without asking his consent to the sale: that is surely a compulsory proceeding. The eventual purchase, which is consequent upon that notice, is compulsory.)

There may be a compulsory purchase of some kind; but it is not necessarily the same, in all respects, as that which is contemplated by the notice.

[*847] (PATTESON, J.: Where does the Lands *Clauses Consolidation Act enumerate or define the compulsory proceedings?)

Sect. 21 provides that, if, after the notice, the landowner refuses to state the particulars of his claim, or to treat, or does not come to an agreement with the Company as to the price of his land, or the amount of compensation for damages done to him in respect of it, certain steps are to be taken, which are set out immediately afterwards. These steps are compulsory proceedings; but the statute clearly does not treat the notice itself as a compulsory proceeding.

(COLERIDGE, J.: Suppose that, upon the notice to treat, the landowner names a price, to which the Company agrees, and the Company thereupon enter. Which of these steps is the first compulsory step towards a purchase?)

None of these steps is compulsory: a compulsory purchase takes place only when no agreement is come to as to the price.

(COLERIDGE, J.: The eventual purchase, whether an agreement be come to or not, is compulsory.)

Phipson, contrà:

The Company have a right to enter upon the lands. They have

sufficiently exercised their powers of compulsory purchase within the prescribed period. It is not necessary to the complete exercise of those powers that the purchase itself should be completed. It is true that sect. 27 of the Company's special Act limits the exercise of only the powers "for the compulsory purchase" of lands, and that sect. 123 of the Lands Clauses Consolidation Act limits the powers "for the compulsory purchase or taking" of lands. But it is clear that "purchase" and "taking" there mean the same thing; for the statute provides no other mode of taking lands than by the notice to the *landowner and the other steps prescribed for [*848] compulsory purchase: and sects. 75, 76, 77, which prescribe the mode of conveyance, either compulsory or otherwise, from the landowner to the Company, show that the word "purchase," as used in the statute, is not intended to include necessarily the formal completion of the legal title, but means merely the acquisition of the right to have the land conveyed. That right the Company have acquired in the present case.

(COLERIDGE, J.: The plaintiffs say that the Company have not done all that the Legislature enables them to do adversely.)

It cannot be contended that the execution of a deed poll by them is necessary to complete the exercise of their adverse powers: and every step but that (which is only to be taken on a particular contingency) they have taken. In *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (1) the Company, who had entered upon the land after giving the notice, paying the deposit and giving the bond, as required by sect. 85, were held to have the right to continue in possession. There the only step taken by them in addition to those which have been taken by the Company in the present case was that of entry: but that is not an exercise of the compulsory powers. Sect. 85 declares that "it shall be lawful" for the Company to enter after the steps prescribed by that section have been taken. Those steps are the compulsory steps; the entry is not one. And, as to the execution of a deed poll by the Company being necessary to complete the exercise of the compulsory powers by them, it is clear that, if, in *Doe* d. *Armitstead* v. **North Staffordshire Railway Company* (1), compensation for the lands entered upon [*849] by the Company had been regularly assessed, and Armitstead had then been unable, or refused, to convey, the Company would have

(1) 83 R. R. 577 (16 Q. B. 526).

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had a right to execute a conveyance to themselves, although the three years had expired. If that were not so, a Company would incur the hardship of having a Parliamentary right to the possession of the land, but not such a title as would enable them to sell any part of it, which, under sect. 18 of the Lands Clauses Consolidation Act, they are empowered to do.

(LORD CAMPBELL, Ch. J.: In *Worsley* v. *South Devon Railway Company* (1) a plea of entry by a Company under similar circumstances was held to set up a legal interest in the land.)

All that the Company have to do, in order to exercise their compulsory powers completely, is to acquire such an interest in the lands as will be a defence to an action of ejectment by the landowner.

As to the argument that notice by the Company to the landowner binds only the Company: In *Doo* v. *The London and Croydon Railway Company* (2), which was decided before the passing of the Lands Clauses Consolidation Act, Lord COTTENHAM held that, where a Company had agreed with the lessees of certain land to purchase their interest therein upon notice being given to them by such lessees, a notice to that effect by a lessee at once placed the Company and the lessee in the position of purchaser and vendor. The principle upon which that case was decided applies to the present case. *Walker* v. *Eastern Counties Railway Company* (3) expressly [*850] decides that a notice by the *Company to a landowner, under sect. 18, has the effect of creating a contract between the Company and the landowner for the purchase of the land. *Salmon* v. *Randall* (4) is a decision to the same effect with respect to a similar notice by a Company under a local Act. In *The Birmingham and Oxford Junction Railway Company* v. *The Queen* (5) PARKE, B. says that the notice by the Company to the landowner "amounts to an inchoate contract by them to pay the price." In *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (6) and in *Reg.* v. *York, Newcastle and Berwick Railway Company* (7) the Courts express a similar opinion. In *Edinburgh and Glasgow Railway Company* v. *Monklands Railway Company* (8), argued in the Court of Session in

(1) 83 R. R. 587 (16 Q. B. 539).
(2) 1 Rail. Cas. 257.
(3) 77 R. R. 248 (6 Hare, 594).
(4) 45 R. R. 306 (3 My. & Cr. 439, 449).
(5) 81 R. R. 724, note (4) (15 Q. B. 647, note (*b*)).
(6) 82 R. R. 732, 740 (5 Ex. 475, 486, 487).
(7) 16 Q. B. 886, 904.
(8) 12 Court of Sess. Cas. (2nd Series) 1304.

Scotland, it was held that notice by a Company, to a landowner, under sect. 17 of the Lands Clauses Consolidation (Scotland) Act, 1845 (1), was a sufficient taking of the lands, if it had been given within the period fixed by sect. 116 for exercising the powers of compulsory purchase.

(COLERIDGE, J.: Sect. 27 of the Great Northern Railway Company's Act, and sect. 123 of the Lands Clauses Consolidation Act, speak of "powers," in the plural: that does not look as if the one step of giving notice amounted to a complete exercise of those powers.)

It is a complete exercise of them so far as is necessary to put the Company and the landowner in the position of purchaser and vendor. That was held in *Adams* v. *The London and Blackwall Railway Company* (2), which has been *cited as an authority on the other side. [*851]

(LORD CAMPBELL, Ch. J.: A sort of purchase is no doubt created by the notice.)

In *Brocklebank* v. *Whitehaven Junction Railway Company* (3), which has also been cited for the plaintiff, Lord COTTENHAM disagreed with the decision of Vice-Chancellor SHADWELL; and it was questioned by this Court in *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (4). In *Sparrow* v. *The Oxford, Worcester, and Wolverhampton Railway Company* (5) it was held that the power of entry did not expire with the period prescribed for the completion of the powers of compulsory purchase; and the propriety of the VICE-CHANCELLOR'S decision in *Brocklebank* v. *Whitehaven Junction Railway Company* (3) was much questioned.

Shapter (in the absence of *Bramwell*), in reply:

Notice to treat, under sect. 18, has, in some cases, been held to amount to a contract; but the word "contract" is rather wide. In no case has the notice been held to amount to more than an inchoate agreement for the sale of the land. A contract which places the parties to it in the position of vendor and purchaser for the time is not necessarily a contract to purchase. The entry by the Company is, to some extent, a contract, just as the taking possession by a vendor of land agreed to be sold has been held to create a contract

(1) Stat. 8 & 9 Vict. c. 19.
(2) 2 Mac. & G. 129.
(3) 15 Sim. 632.
(4) 83 R. R. 577, 585 (16 Q. B. 526, 536).
(5) 9 Hare, 436.

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so far as to make it unnecessary that the contract of sale should be in writing as provided by the Statute of Frauds.

(LORD CAMPBELL, Ch. J.: You allow that, if the Company had entered, the contract would have been complete.)

That may be admitted.

[852] (LORD CAMPBELL, Ch. J.: At what stage do you say that the Company would have completely exercised their compulsory powers?)

When they had taken steps to summon a jury, under sect. 68. In *In re The East Lincolnshire Railway Act* (1) Lord CRANWORTH, V.-C. states at some length the whole process by which a Railway Company, under the Lands Clauses Consolidation Act, are to obtain possession of lands otherwise than by agreement. The payment of the deposit into the Bank is not an element in the purchase at all: the deposit is merely a kind of caution money, given as a security for the payment by the Company of whatever sum may be subsequently assessed.

LORD CAMPBELL, Ch. J.:

This case has been very fully and ably argued; and all the authorities which could be adduced on either side have been brought before us. I think we may with perfect safety express our opinion at once. The question for the consideration of the Court is, whether the Company had the right to take the lands of the plaintiff comprised in the notice dated 21st May, 1851. To determine this, we must look to the state of facts at that time. After the notice had been given by the Company, all the steps prescribed by sect. 85 of the Lands Clauses Consolidation Act had been taken by them. That is not disputed. Then, what powers are given to them when those steps have been taken? Sect. 85 declares that it shall then "be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase
[*853] money or compensation in other *cases required to be paid or deposited by them before entering upon any lands to be taken by them" under the provisions of that or the special Act. The Company, however, had not entered before the expiration of the period prescribed for the exercise of their compulsory powers for the purchase of lands by sect. 27 of their special Act: and the

(1) 1 Sim. N. S. 260.

question is, whether they had a right to enter afterwards. It was decided in *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (1) that, where a Company, having taken all the steps under sect. 85, had entered before the expiration of the prescribed period, an action of ejectment would not lie against them after such period had expired. We have, therefore, at present, to consider what would be the effect of a Company not entering within the prescribed period. This depends much upon whether the entry is an exercise of one of the powers of compulsory purchase. In my opinion, it is not. I think the power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase. Those powers have been, I think, exercised within the five years. Strictly speaking, there is no purchase, and no contract, created by the notice under sect. 18; but the Company and the landowner are placed by the notice in the same position as if a contract of purchase had actually been entered into by them. In *Reg.* v. *Birmingham and Oxford Junction Railway Company* (2), the judgment in which case was confirmed in the Exchequer Chamber (3), we held that the notice places the Company and the landowner in the position of purchaser *and vendor, and that the contract [*854] thereby created may be considered as mutual, it being in the landowner's power to compel the Company, after the expiration of the period prescribed for exercising their compulsory powers, to complete the purchase. It is possible that there may be no reciprocity in the transaction; that the landowner may be free, and the Company bound: but we should not, except with the greatest caution, arrive at such a conclusion. It seems to me, on the contrary, that the intention of the Legislature was that the contract of purchase should be complete as soon as the notice had been given by the Company. The great majority of decisions is strongly in favour of this view. Lord COTTENHAM (notwithstanding some expressions apparently tending the other way in *Adams* v. *The London and Blackwall Railway Company* (4)) has said, again and again, that the notice places the Company and the landowner completely in the position of purchaser and vendor. In *Edinburgh and Glasgow Railway Company* v. *Monklands Railway Company* (5) three learned Judges took the same view, although the fourth

(1) 83 R. R. 577 (16 Q. B. 526).
(2) 81 R. R. 716 (15 Q. B. 634).
(3) 81 R. R. 724, note (4) (15 Q. B. 647, note (*b*)).
(4) 2 Mac. & G. 118, 129.
(5) 12 Court Sess. Cas. (2nd Series) 1304.

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differed. With great respect for the opinion of the late Vice-Chancellor SHADWELL, I cannot agree with his decision in *Brocklebank* v. *Whitehaven Junction Railway Company* (1). That case, and *Kinnersley* v. *The North Staffordshire Railway Company* (2), have been not only much shaken, but actually overturned, by subsequent decisions. I will not rely upon the decision in *Sparrow* v. *The Oxford, Worcester, and Wolverhampton Railway Company* (3),

[*855] *inasmuch as that case, in another stage, is still under consideration. But I consider that I am justified, both by the language of the statute, and by the existing decisions upon it, in holding that the contract of purchase must be looked upon as completed upon the notice being given by the Company, the amount of purchase money alone remaining undetermined. I am therefore of opinion that we should certify that the defendants had a right to take the lands in question.

PATTESON, J.:

The question submitted for our consideration is, Whether the defendants had a right to enter upon the lands described in the notice. Now it is only under sect. 85 of the Lands Clauses Consolidation Act that they have this right: because, except under that section, a Company cannot enter upon lands until the amount of compensation has been determined, and either paid to the landowner or deposited in the Bank. Sect. 85, however, enables them, when the landowner does not come to terms, and delay might be mischievous, to enter upon the lands without such conditions. It is admitted that, in the present case, the Company have taken all the steps prescribed by sect. 85: and that, if, within the prescribed period, they had actually entered upon the lands, or the landowner had resisted such entry and they had taken forcible possession under sect. 91, they would have completely exercised their powers of compulsory purchase. The question therefore is, whether, not having entered within the prescribed period, they are precluded, by sect. 27 of their special Act, from doing so now. That depends

[*856] upon whether *the entry upon the lands is or is not an exercise of one of their compulsory powers. I am of opinion that it is not, and that the Company have, within the prescribed period, taken all the steps necessary for the compulsory purchase of the lands. I do not at all dissent from the decisions in which it is laid down

(1) 15 Sim. 632.
(2) 13 L. T. 340.
(3) 9 Hare, 436.

that the mere notice by the Company is of itself sufficient to create a contract of purchase between them and the landowner. But here much more has been done: all the steps prescribed by sect. 85 have been taken by the Company. The principle, however, established by the cases is that the notice is all that is necessary as an exercise of the compulsory powers: the steps which follow are not of a compulsory character, but are merely for the purpose of completing the compulsory purchase to which the Company has acquired a right by the notice. Lord MONCREIFF, in *Edinburgh and Glasgow Railway Company* v. *Monklands Railway Company* (1), makes a pointed distinction between the powers of purchase and the general compulsory powers of the Company. In *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (2) it was held that where the Company had taken possession of the land within the prescribed period they might continue in possession after it had expired. It was then asked how the landowner was to obtain the purchase money. But the landowner is clearly enabled to do that by taking proceedings, if necessary, under sect. 68.

COLERIDGE, J.:

I am of the same opinion. The *question turns on the construc- [*857]
tion of sect. 27 of the Company's special Act. What are "the powers of the Company for the compulsory purchase of lands," there mentioned? A distinction must be drawn between powers for compulsory purchase, and powers for completing a compulsory purchase. In a large sense both may be called powers for compulsory purchase; and that may account for the word "powers," in the plural, being used in sect. 27 of the special Act. But a power for compulsory purchase, strictly speaking, is a power which enables one to purchase land from an owner who is unwilling to part with it. I consider the giving the notice to be a sufficient exercise of that power: the notice does enable the Company to purchase, whether the landowner chooses or not; and all that is done by them afterwards is done only for the purpose of completing the title, and is done as much for the benefit of the landowner as of themselves. The landowner ought, therefore, to incur some liability on his side. The Legislature might, no doubt, have made the notice operate as a one-sided engagement only: but they have not said so expressly; and I see no ground for presuming so

(1) 12 Court Sess. Cas. (2nd Series) 1304.

(2) 83 R. R. 577 (16 Q. B. 526.).

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unreasonable an intention. There is another view of this question, which seems to me to be not without importance. It is admitted that all the steps under sect. 85, except entry, have been taken by the Company; and that, if entry had been made within the prescribed period, their powers for compulsory purchase would have been completely exercised. If entry is not an exercise of those compulsory powers, the case comes to this, that something is taken away from what you admit to amount to a full exercise of the compulsory powers, which is not itself an exercise of those powers. It follows, *therefore, that what remains is still a full exercise of the compulsory powers.

[*858]

WIGHTMAN, J.:

The only question is, whether, after the expiration of the period prescribed for the exercise of the compulsory powers, the Company could enter upon the lands and hold them as against the plaintiff. I think this case is governed by *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (1). It is admitted by the plaintiff that all the steps prescribed by sect. 85 have been taken by the Company, and that entry by them, within the five years, would have made the exercise of their compulsory powers complete. I do not see how it can make any difference whether the taking possession of the land occurs before or after the expiration of that period. If the Company, after what they had done, had a right to enter at once, the entry is not an exercise of their compulsory powers, but an act which the previous exercise of those powers entitles them to do. Here they had acquired the right of entry; and it is immaterial whether they exercised that right within the five years or not.

Judgment for the defendants: and certificate to be sent accordingly.

1852.
April 24.
June 18.

REG. *v.* OVERSEERS OF LONGWOOD (2).

(17 Q. B. 871—883.)

[871]

By certain local Acts, Commissioners were authorized to purchase lands, construct reservoirs, and lay down pipes, for the purpose of supplying the town and neighbourhood of H. with water: they were empowered to divert the water from springs in a township, L., adjoining H.: and they were required, by way of compensation to certain mill owners in L. who had previously used the said springs, to construct one reservoir in L., and to

(1) 83 R. R. 577 (16 Q. B. 526).

(2) See *Worcester Corporation* v. *Droitwich Assessment Committee* (1876) 2 Ex. D. 49, 46 L. J. M. C. 241; Ryde on Rating, pp. 293—304, 2nd ed.—A. C.

impound therein sufficient water for the use of the mill owners. The Commissioners were also authorized to borrow money on the security of their works and water rents. All the money so raised by them was to be applied to the purposes of their Acts. Water was to be supplied to the premises of such inhabitants of H. and its neighbourhood as might desire it, at certain specified rents, the whole amount not to exceed, in any one year, and after all expenses paid, 7*l.* 10*s.* per cent. on the amount which should then be owing by the Commissioners of the loan to be raised as above mentioned. After the whole loan had been paid off, the rents were to be reduced so as only to cover the current expenses of executing the powers of the Acts. Water was to be supplied for watering the streets at 1*d.* for every 100 gallons; and, in case of fire, gratis. Under these powers the Commissioners borrowed money, and constructed two reservoirs in L., one for the supply of water to H., and the other as a compensation reservoir to the mill owners in L., and laid down pipes in L. The water rents were charged and applied as directed by the Acts.

The Commissioners were rated to the poor in L. at 490*l.*; the Sessions finding that sum to be the estimated net rateable value per annum of all the water works in L., taken in connexion with, and as part of, the entire water works in L. and H.; the 490*l.* being made up of 300*l.*, the net annual value of the reservoirs in L., and 190*l.*, the net annual value of the pipes and other apparatus in L. The Sessions also found that a yearly tenant of the entire water works, if released from the restrictions in the Acts, and able to exercise his discretion as to the amount of water rents and rates, might calculate on a gross revenue of 3,000*l.* from the works: and that, after deducting 800*l.* as the average of current annual expenses, and 1,100*l.*, annual deduction for repairs and tenant's profits, the residue of 1,100*l.* represented the net rateable value per annum of the entire works to such a yearly tenant: but that, if the tenant were subject to the restrictions in the Acts, he could make no profit at all.

Held, by COLERIDGE, J.: That the real occupiers, and the parties really rated, were not the Commissioners, but the consumers of the water; and that the use and enjoyment of that water constituted the rateable value: the restrictive clauses in the Acts being no more than an arrangement between the Commissioners and the consumers, taken as one body, as to the terms upon which the consumers were to enjoy the benefits arising from the occupation of the land. That, therefore, in calculating the net rateable value of the works in L. by the usual test of a hypothetical annual tenancy, the restrictions imposed on the Commissioners by the Acts ought not to be taken into calculation in estimating the value of the tenancy. And that, consequently, assuming 490*l.* to be that proportion of the 1,100*l.* (the net rateable value per annum of the entire works in L. and H.) which was attributed by the Sessions to L., that sum of 490*l.* had been arrived at on a right principle:

Held, by WIGHTMAN, J. and CROMPTON, J.: That the case put by the Sessions of an annual tenant free from all restrictions was not a supposable one with respect to property of this description, and could not, therefore, furnish a criterion; and that, consequently, the principle on which it was sought to raise the assessment having failed, the rate must stand at 490*l.*

ON appeal by the Commissioners of the Huddersfield Waterworks against a rate made on or about 30th *March, 1850, for the relief of [*872] the poor of the township of Longwood, in the West Riding of Yorkshire, in which the Commissioners were rated at the sum of 1,010*l.*

REG. v. OVERSEERS OF LONGWOOD.

for certain reservoirs, banks, pipes, lands and hereditaments situate in the said township, the Sessions allowed the appeal and reduced the rate to 490*l.*, subject to the opinion of this Court on the following case.

The said Commissioners are occupiers of the above mentioned lands and hereditaments, upon part of which the said reservoirs and pipes are constructed and laid. The Commissioners purchased the said lands, and constructed the said reservoirs and pipes, under

[*873] and by *virtue of an Act &c., 7 & 8 Geo. IV. (1), "for supplying with water the town and neighbourhood of Huddersfield, in the West Riding of the county of York." This, and another Act, 8 & 9 Vict. (2), "to alter, enlarge, and amend an Act" &c. (the Act first mentioned), were to be considered part of the present case (3).

The following facts were found by the Sessions.

After the passing of the said Act of 7 & 8 Geo. IV., and before the passing of the said Act of 8 & 9 Vict., two reservoirs, one for the supply of water to the town of Huddersfield, and the other as a compensation reservoir to prevent injury to certain owners and occupiers of mills in Longwood, were constructed on part of the said lands in Longwood so purchased and occupied by the said Commissioners, of the dimensions, in the manner, under the powers and provisions, and subject to the conditions and restrictions, contained in the statute of 7 & 8 Geo. IV., and which said two reservoirs have respectively been used ever since their construction until the passing of the above mentioned Act of 8 & 9 Vict., in the manner, and subject to the conditions and restrictions, and in strict conformity with the powers, mentioned and contained in the said statute of 7 & 8 Geo. IV.: and since the passing of the Act of 8 & 9 Vict. the Commissioners have constructed another reservoir in Longwood and also occupied the same in the manner, and subject to the conditions and restrictions, and in strict conformity with the

[*874] powers, mentioned and contained *in both the above mentioned statutes, as far as the same respectively are applicable. The Commissioners appointed under the above Acts have borrowed, under the powers thereby given to them, money amounting to 20,000*l.*, and have laid down pipes and other conveniences in Longwood for conveying water to the township of Huddersfield, by means of which

(1) Stat. 7 & 8 Geo. IV. c. lxxxiv. (local and personal, public).

(2) Stat. 8 & 9 Vict. c. lxx. (local and personal, public).

(3) Those clauses of the two Acts which are material to the present case will be found in *Reg.* v. *The Overseers of Longwood*, 13 Q. B. 116, 119, note (*a*).

a constant and ample supply of water has been and is provided under the said Acts to the said township.

The Commissioners have received the rents which by their said Acts they have been from time to time entitled to demand for such supply of water to Huddersfield; and have from time to time applied the rents so received to the purposes of the said Acts; and the said water rents have been reduced by the Commissioners to one half the amount which was originally charged by them for such supply of water, by authority of their said Acts, to the said township of Huddersfield.

The compensation clauses which were inserted in the said Acts, to prevent injury to individual owners and occupiers of mills in Longwood, have been strictly observed and fulfilled by the Commissioners: and the compensation reservoir has been made by them as aforesaid for the exclusive use of the said owners and occupiers of mill property in Longwood, and has been used by them accordingly on part of the land for the occupation of which the Commissioners are now rated, by which the said mill property and the said mill owners have been protected from injury.

The said mill owners obtaining water or deriving benefit from the said compensation reservoir do not pay, nor have they ever paid, any rent or consideration in money or otherwise to the said Commissioners. Every *thing required to be done, observed or performed by the said Commissioners by the above Acts of Parliament, or either of them, either for the reservation of the rights of the inhabitants of Longwood or other parties mentioned in the said Acts or either of them, or for any other purpose whatsoever, has been done, observed and performed by the said Commissioners. The works bring no water to Longwood; but they detain water in that township in winter; and the supply of water to Longwood has not been interrupted since the passing of the above Acts or of either of them. The said owners of mill property in Longwood have been benefited by the works made under the said Acts. [*875]

The Sessions also found: 1. That the above sum of 490*l.* is the estimated net rateable value per annum of all the reservoirs, pipes and other apparatus of the Company in Longwood, taken in connection and as part of the entire waterworks in Longwood and Huddersfield; and that the amount is made up of the sum of 300*l.*, being the net annual value which the Sessions assigned to the reservoirs, and the sum of 190*l.*, being the net annual value of the pipes and other apparatus in Longwood, as shown by the appellants and found by the Sessions.

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2. That, if the whole works in Longwood ought to be assessed at their intrinsic value in that township, and with reference to the profit that could be derived from them in Longwood alone without taking into account their connection with the works in Huddersfield, then their net rateable value ought to stand at 150*l.* and no more.

3. That a yearly tenant of the entire waterworks, if released from
[*876] the restrictions contained in the Commissioners' *Acts of Parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate with reasonable certainty on a gross revenue of 3,000*l.* from the works; and that, after deducting the sum of 800*l.*, which the Sessions considered to be the fair average of the current annual expenses allowable under the circumstances, and the sum of 1,100*l.*, which was proved and admitted by the respondents to be a proper annual deduction in respect of repairs, renovations and tenant's profits, the residue of 1,100*l.* represents the net rateable value per annum of the entire works.

4. That, if such yearly tenant is to be considered as subject to the restrictions in the Acts, he could make no profit at all by his tenancy.

5. That the total outlay of the Commissioners in Longwood has been $\frac{11}{18}\frac{5}{0}$th parts of the entire outlay in the two townships. That the present actual value of the respective works in the two townships may be assumed, for the purposes of this case, to be equal. That the area occupied by the reservoirs and the apparatus (consisting of mains and pipes) in Longwood is 28 acres and a quarter, out of which the reservoirs comprise 27 acres, and the apparatus $1\frac{1}{4}$ acres; and the area occupied by the like apparatus in Huddersfield is 7 acres. That the length of the apparatus of mains and pipes in Longwood is to the length of the like in Huddersfield in the proportion of 5 to 26: thence it follows that, if the total net annual value be apportioned in the ratio of the outlay, the rateable value of the whole works in Longwood will be 669*l.* and a fraction. If it be apportioned in the ratio of the actual value of the respective works in the two
[*877] townships, the rateable *value of the works in Longwood will be 550*l.* If it be apportioned in the ratio of the area or acreage occupied by the whole works, the rateable value of the works in Longwood will be 881*l.* and a fraction.

6. If the reservoirs be rated separately at the value specified above, and deducted from the total net value of the entire works as found above, and the residue be apportioned in the ratio either of the area or the length of the apparatus in the respective townships, then the net rateable value of the whole works in Longwood will on

the first supposition be 441*l.* and a fraction, and on the second 429*l.* and a fraction.

If the Court of Queen's Bench should be of opinion that the rateable value of the property and works of the Commissioners in Longwood should be fixed at either of the other sums so found by the Sessions as above mentioned, the said sum of 490*l.* was to be altered to such sum as this Court might decide to be such rateable value, and the judgment of the Sessions to be altered accordingly.

If the Court should be of opinion that 490*l.* is the proper rateable value of the property and works of the said Commissioners in Longwood, the judgment of the Sessions was to stand confirmed.

The case was argued, in last Easter Term (1), by *Pashley* and *Overend* for the appellants, and *R. Hall* and *Pickering* for the respondents. *Reg.* v. *Overseers of Mile End Old Town* (2), *Reg.* v. *Overseers of Longwood* (3), *Reg.* v. *Kentmere* (4), *Reg.* v. *Harrogate* *[*878] *Commissioners* (5), *Reg.* v. *The Cambridge Gas Light Company* (6), *Reg.* v. *Great Western Railway Company* (*Great Western Railway Company* v. *Tilehurst*) (7) were cited in the argument.

Cur. adv. vult.

COLERIDGE, J. now delivered judgment as follows:

In this case, which was argued before my brothers Wightman and Crompton and myself, the question was upon the amount at which the Commissioners of the Huddersfield Water Works ought to be rated to the relief of the poor in Longwood, as the occupiers of certain reservoirs, banks, pipes, lands and hereditaments situate in the latter township: and, as the Sessions have found that 490*l.* is the estimated net rateable value per annum of the premises above mentioned, taken in connection with and as part of the entire water works in Longwood and Huddersfield, it was conceded, in the argument for the respondents, that the rate must stand at that amount (with which the appellants were contented) unless they could show it ought to stand at a higher; and they contended that this was shown upon the following finding of the Sessions: That a yearly tenant of the entire water works, if released from the

(1) April 24th, 1852. Before Coleridge, Wightman and Crompton, JJ.

(2) 74 R. R. 268 (10 Q. B. 208).

(3) 13 Q. B. 116. [See now *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.]

(4) *Ante*, p. 568 (17 Q. B. 551).

(5) 15 Q. B. 1012. [See now *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.]

(6) 47 R. R. 490 (8 Ad. & El. 73).

(7) 81 R. R. 636 (15 Q. B. 379, 1085).

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restrictions contained in the Commissioners' Acts of Parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate on a gross revenue of 3,000*l.* from the works; which, after making the proper allowances and deductions, would leave the sum of 1,100*l.* as the net rateable value of the entire works. The Sessions having found this, the respondents insisted [*879] that, in order to arrive at the true rateable value, a *tenancy must be supposed, unfettered by the statutory restrictions above alluded to. These I understand to be, the obligation to furnish water gratis in case of fire, to supply it at 1*d.* per 100 gallons for watering the streets, and to the consumers at certain specified rates so calculated that the amount of the water rent is not, in any one year, after payment of the expenses, to exceed 7½ per cent. on the amount of the debt which should be owing; the effect of which will be that, when the debt is extinguished, the rent is only to be equal to the expenses.

The cases mainly relied on, and from which I think the principles are to be gathered by which the question before us must be decided, are *Reg.* v. *Overseers of Longwood* (1) and *Reg.* v. *Kentmere* (2).

In the former case, which related to the same appellants, and in which the preliminary facts were stated in the very same words as those now used, the only point decided was the rateability of the Commissioners (3); but the COURT came to that conclusion in this way: "If private speculators," say they, "had invested capital for a supply of water at a profit, and had so become the occupiers of the premises in question in Longwood, they would have become rateable: *Reg.* v. *Overseers of Mile End Old Town* (4); and the money paid for the rate would be part of the costs of the supply, and would fall on the consumer. The private Acts enable a portion of the inhabitants, by Commissioners, to obtain the supply without the intervention of a Water Company. But, as far as respects the rights of other townships, this portion of the inhabitants, by their [*880] Commissioners, stand in the *position of an ordinary Water Company, and have no greater right to exempt from rateability a portion of land in Longwood, and so to obtain water at a less cost, than such a Company would have had" (5). The COURT, therefore, arrived at the conclusion that the Commissioners were rateable at

(1) 13 Q. B. 116.
(2) *Ante*, p. 568 (17 Q. B. 551).
(3) See now *Mersey Docks* v. *Cameron* (1864) 11 H. L. C. 443, 35 L. J. M. C. 1.—A. C.
(4) 74 R. R. 268 (10 Q. B. 208).
(5) 18 Q. B. 125.

all, by considering them as the representatives of, the trustees for, and identical in interest with, a certain portion of the inhabitants of Huddersfield, and not merely as public officers, acting for the public and having no interest but as members of the public. In *Reg.* v. *Kentmere* (1) this view was adopted; and the rateability of the Commissioners there was also established.

These cases appear to me to have been decided with great propriety: and I think they ought to govern our decision as to the question immediately before us. It is contended that the measure of rateability is the amount of rents which the Commissioners in fact receive from the consumers of the water supplied, restricted as they are by the private Acts; and, consequently, it must be contended that, when all the outstanding incumbrances are paid off, and these rents are, under sect. 74, reduced so as merely to cover the current expenses, there will be nothing on which to rate at all: and this might be true if the Commissioners were, like a Water Company, a body separate in interest from the consumers, and, being so, were also occupying a property which the Legislature had made wholly unproductive of profit to them. Whether that unproductiveness were the result of inherent and natural causes, or of an act of the Legislature, the same consequences might follow: the subject-matter of the rate would *de facto* have been limited in the first instance, and gradually have ceased *to exist. But then [*881] the inhabitants of Longwood would have had reason to complain that a portion of rateable property had been withdrawn from contribution to their poor rates for the benefit of certain inhabitants of Huddersfield.

This, however, is prevented by looking at the Commissioners and consumers as one body, trustees and cestui que trusts, as it were; and, when they are so considered, the restricting clauses become no more than an arrangement between themselves as to the terms on which the latter will enjoy the benefits flowing from the occupation of the land. These benefits are, the supply of water for the various purposes enumerated in the Act: and these arrangements have no bearing whatever on the question of rateable value as between themselves and the inhabitants of Longwood. If some munificent person should provide a fund to bear the whole expenses of the works, so that the Commissioners were to supply the water gratis to the consumers, it could not be contended that thereby the occupation had ceased to be beneficial, or the occupiers not liable to be rated

(1) *Ante*, p. 568 (17 Q. B. 551).

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in respect of it; the fruits of the land would still be the water supplied; and consumers occupying through the Commissioners must, through them, be rated as before.

The Sessions find that, if the supposed yearly tenant be to be considered as subject to the restrictions in the Act, he could make no profit at all by his tenancy: and that is true; for substantially he could only receive such a return from the consumers as would be exactly equivalent to his outlay. And this seems to me to show that these restrictions can have no bearing on the question of the amount of the rate. It is said that to discard the consideration of them is to make the Commissioners pay, not on their actual [*882] receipts, but on *imaginary ones which they might, under other circumstances, receive. The answer is, that in substance the Commissioners are not the occupiers nor the parties rated, nor do the water rents represent the rateable value of the land. The consumers are the occupiers really; they are really rated, *i.e.*, they pay the rate; and the use and enjoyment of the water constitutes the rateable value.

I feel, therefore, I confess, no difficulty on the question raised by the third and fourth findings of the Sessions. The two cases cited seem to me to have concluded the Court on this point and to have decided it rightly: and, as to the suggestion which has been made that the Commissioners should pay as an ordinary Water Company would pay, subject to the ordinary restrictions of a Water Company, the answer seems to me to be: First, they are not an ordinary Water Company, but an invention to avoid the necessity of a Water Company, and so to escape the payment of such prices as an ordinary Water Company, or any third party supplying water to customers, would require: Secondly, I am not aware that the law imposes, or that the Court can take notice of, any restrictions on Water Companies as ordinary. For myself, I really do not know, nor does the case find, what they are.

But, when I came to determine the specific question whether the rate is to stand at 490*l.* or any thing higher, I feel a difficulty, because it is not stated on what principle that first sum is arrived at. It is stated to be "the estimated net rateable value per annum:" if so, of course it is the right sum. On the principle stated in the third finding, 1,100*l.* is made to represent the net rateable value per annum of the entire works in Longwood and Huddersfield. If 490*l.* be the proportion of the 1,100*l.* which the [*883] Sessions attribute to Longwood, then *490*l.* is the right sum, and

has been arrived at on a right principle: at least the whole sum of 1,100*l.* has been arrived at on a right principle; and whether the proportions of the two townships are accurately struck in amount we have no means of ascertaining, and are not called on to ascertain.

As the 490*l.* may be what the Sessions have taken as the right proportion of the 1,100*l.*, I think I am bound to assume that it is; and on this ground I am of opinion, for the appellants, that the rate ought to stand at that sum.

My brothers WIGHTMAN and CROMPTON arrive at the same conclusion on somewhat different grounds. They do not think that the case put by the Sessions of a tenant who may charge any rates he pleases can furnish the proper criterion for the amount of a rate in respect of property of this peculiar description, which could have no existence in the hands of a tenant or ordinary Water Company without some legislative restriction as to the amount of rates: and they think that a fictitious and impossible value would be put upon the land by supposing the case of a Water Company or tenant able to put their own price upon the water supplied, as no such Company or tenant could obtain the powers necessary for such an undertaking without some legislative restrictions as to the price of the water to be supplied. Not being satisfied with the criterion suggested in the third finding of the Sessions, they concur with me in thinking that the rate must stand at 490*l.*, the sum which was to be taken as the proper amount if the respondents failed in establishing the principle for which they contended.

Order of Sessions confirmed.

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(17 Q. B. 905—937.)

1851. *Nov.* 18.
1852. *Jan.* 14.

[905]

Testator, having three natural daughters, namely, D., married to B., S., married to W., and L., unmarried and a minor, devised lands to uses as follows.

To B., and D. his wife, for their joint lives and the life of the survivor; remainder to such one son of the body of D. as the survivor should appoint; remainder, in default of appointment, or on decease of such son without issue male, &c., to the first, second &c. and every other son of the body of D. by her present or any future husband, successively, according to seniority, and to the respective heirs male of their bodies; remainder, in default of such issue &c., to W. and S. his wife, for the like life estates, and to the son and sons of the body of S. by her present or any future husband, with the like power of appointment, for the like estates, and with the like remainders,

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as in the preceding devise. And, for default of such issue of the body of S., remainder to L., or such person as she shall first intermarry with (if before she attains 21, with the consent and approbation of E. and C., trustees under the will, or the survivor of them and his heirs, and which person shall also previously make a competent settlement upon L. by deed, to the like approbation), for their joint natural lives and the life of the survivor; and, from and after the decease of L., and of such person as she shall so first marry, if any, then to the son and sons of the body of L. by such first or any after taken husband, with the like power of appointment, and for the like estates, and with the like remainders, as aforesaid in relation as aforesaid. Remainder, for default of such issue of the body of L., to Sir J. S. for his life, remainder (in default of appointment by him to one of his sons as was specified in the will) to his eldest son by his then wife, in fee.

And, after a further devise of lands to B. and D. and the son and sons of D. in tail male, with like limitations in remainder successively to W. and S. and to L. (and such person as she may so marry, if any, as aforesaid), and to Sir J. S. and his son or sons &c. as in the preceding devises, the testator charged part of the last-mentioned lands with two rent charges to uses as follows: First rent charge, to W. and S. (the second daughter) for such life estates and with such remainders as in the first and secondly mentioned devises, except that the power of appointment was in favour of the son and sons of the body of Sophia and the son or sons of such son or sons, in such shares, and for such estates, or chargeable with such payments to the other or others of them, as the survivor of W. and S. should appoint; the next remainder to take effect in default of such appointment, or on determination of the estates thereby limited, and as to such part of the rent charge whereof no appointment should be made: and, for default of issue &c., or if W. and S. or either of them should inherit any of the aforesaid hereditaments in succession by virtue of the aforesaid devises, the rent charge was to sink into the hereditaments &c. charged therewith, and be no longer payable. Second rent charge to L. (the third daughter) and her assigns, until she shall marry (under and with the restriction above mentioned), or for the term of her natural life; and, when and so soon as she shall marry as aforesaid, then upon such trusts &c., and with the like powers, and for the like estates and interests, and with the like remainders, and subject to the same contingencies and annihilations, as were expressed in relation to the previous rent charge.

Testator then gave legacies of 5,000*l.* to B. and W. respectively, and directed that, in case of a separation between W. and S., the devises and bequests to W. should go over, and be held to the sole use of S., his wife. And he bequeathed to L. 10,000*l.*; 5,000*l.* thereof to be paid to her on her marriage (with such consent and approbation as aforesaid), and 5,000*l.* within two years next afterwards.

After testator's death, L., being still a minor, married without consent of the trustees, and without any settlement. She had one son by this marriage; and subsequently, and after coming of age, married a second husband. After that marriage, she made an appointment to the use of the son:

Held that the appointment was well made:

For that the devise of rent charge to L. "when and so soon as she shall marry as aforesaid" did not make the marriage of L. according to the terms of the previous devise to her a condition precedent to the exercise of her power of appointment or the vesting of the estates limited in remainder to her son and sons; nor did her marrying in breach of the testator's

restrictions disable her from executing the power after she came of age, or prevent the limitation to her son and sons from taking effect.

Semble, that, although L. could not claim the 10,000*l.* legacy while she was a minor and married in disobedience to the terms of the will, yet she might have claimed it after her second marriage and attainment of full age.

REPLEVIN for 2,000 pigs of lead taken in the manor or regality of Hexham and in the manor of Anick Grange, in Northumberland.

Avowry, in substance as follows: That, before the time when &c., [906] Sir Thomas Blackett, Baronet, formerly called and known by the surname of Wentworth, was seised in his demesne as of fee of and in, amongst other manors, lands &c. in the counties of York, Northumberland and Durham, the said manor &c., of Hexham and the said manor of Anick Grange and the said close in which &c., as being parcel of the demesnes of the said manor of Anick Grange in which &c.: and, being so seised &c., he, afterwards, and before January 1st, 1838, viz. on 29th May, 1792, made and published his last will in writing, bearing date the day and year last aforesaid, and signed &c., and attested &c.; and which said will was as follows:

I do give and devise all that my manor or lordship of Gunnerton in the county of Northumberland, and also all and every of my messuages, farms, lands &c., situate &c., within the towns, townships, precincts or territories of &c. (naming them), in the county of Durham, unto John Erasmus Blackett, of &c., Esquire, and Thomas Cotton, of &c., Esquire, and the survivor of them, and his heirs, upon trust &c. The trusts were: To the use of testator's nephew William Bosville, Esquire, and his assigns, for his life without impeachment of waste; remainder to the trustees to preserve contingent uses and estates, but to *permit W. Bosville [*907] and his assigns to receive the rents and profits; remainder, from and after W. Bosville's decease, to such one of W. B.'s sons as he should by deed or will appoint, and to the heirs male of the body of such son; remainder, in default of such appointment, or of such issue of such son, or if any such should be who should die without leaving issue, to the first son of the body of W. B. in tail male; remainders, also in tail male, to the second and other sons successively of W. B.: Remainder to Thomas Richard Beaumont of Darton, in the county of York, Esquire, and Diana his wife, one of testator's natural daughters, for their joint lives and the life of the survivor, without impeachment of waste; remainder to the trustees to preserve &c.; remainder to such one son of the body

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of the said Diana as the survivor of them the said T. R. Beaumont and Diana should by deed or will appoint, in tail male: and, in default of such appointment, or from and immediately after the decease of such son without issue male of his body, or in case any such should be who should live to attain the age of 21 and should afterwards die without leaving any son or sons of his body lawfully issuing, or such son or sons should also live to attain 21 and should also afterwards die without leaving any issue male of his body lawfully issuing, then to the use of the first, second, third, and every other son and sons of the body of the said Diana by her present or any future husband, severally, successively and in remainder one after another and as they or any of them should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and

[*908]

the heirs male of his body lawfully issuing being *always to be preferred: Remainder, in default of such issue, or if any such should be who should attain 21 and afterwards die without leaving any son or sons of his body lawfully issuing, or if such son or sons should attain 21 and die without leaving any issue male of his body lawfully issuing, to William Lee, of Leeds in the county of York, merchant, and Sophia his wife (another of testator's natural daughters), for their joint lives and the life of the survivor, without impeachment of waste; remainder to the trustees to preserve &c.; remainder to all and every or any the son and sons of the body of the said Sophia by her present or any future husband, with the like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations, as aforesaid in relation to the said Thomas Richard Beaumont and Diana his wife.

"And, for default of such issue of the body of my said daughter Sophia," or if any such should attain 21 and afterwards die without leaving any son or sons of his body lawfully issuing, or such son or sons should also attain 21 and afterwards die without leaving any issue male of his body, "then to the use and behoof of Louisa Wentworth, the other of my natural daughters, or such person as she shall first intermarry with, if any (if before she attains the age of 21, by and with the consent and approbation of the said J. E. Blackett and T. Cotton or the survivor of them and his heirs, and which person shall also previously make a competent settlement upon her my said daughter Louisa by deed

or deeds in writing to the like approbation of the said J. E. Blackett and T. Cotton), for and during their joint natural lives, or the life of the survivor of them, without impeachment of or for any manner of waste: And, from and after the *determination of that estate, [*909] then to the use of the said J. E. Blackett and T. Cotton, and the survivor of them and his heirs, for and during the life of my said daughter Louisa or such person as she shall so first marry, if any, and the life of the longer liver of them, upon trust" to preserve &c. "And, from and after the decease of the longer liver of them my said daughter Louisa and of such person as she shall so first marry, if any, then to the use and behoof of all and every or any the son and sons of the body of my said daughter Louisa by such first or any after taken husband, with the like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations, as aforesaid in relation as aforesaid."

And, for default of such issue of the body of Louisa, or if any such should attain 21 and die without leaving any son or sons of his body, or if such son or sons should attain 21 and die without any issue male of his body, then to Sir John Sinclair of Caithness in Scotland, Baronet, for his life, without impeachment &c.; remainder to the trustees to preserve &c.; remainder to such one of the sons of the said Sir John Sinclair, on the body of his then wife (testator's great niece, the daughter of Lord Macdonald) begotten or to be begotten, for such estates as Sir J. S. should by deed or will appoint: and, for default of such appointment, to the eldest son of Sir J. S. by his then wife, in fee.

"And, as to, for and concerning all and every other of my manors, royalties, messuages," &c., "lands, tenements," &c., "and all my estate and interest in and to all and every such manors, royalties," &c., "or wherein or whereunto I myself am, or any person or persons whomsoever in trust for me is, are, can, shall or may be *entitled or interested either in possession, reversion, remainder [*910] or expectancy," &c., "together with all and every the rights, members and appurtenances whatsoever to the said manors" &c. "belonging or to belong howsoever, I do give and devise the same and every part thereof unto the said J. E. Blackett and T. Cotton and the survivor of them and his heirs to and for such uses" &c.; "and subject to such charges" &c. as after mentioned, viz.: "To and for the use and behoof of the said Thomas Richard Beaumont and Diana his wife and of the son and sons of my said daughter Diana and the heirs male of the body of such son and sons,

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and of the said William Lee and Sophia his wife and of the son and sons of my said daughter Sophia and the heirs male of the body of such son and sons, and of my said daughter Louisa (and such person as she may so marry, if any, as aforesaid), and of the son and sons of my said daughter Louisa, and the heirs male of the body of such son and sons, and of the said Sir John Sinclair and of the son or sons of the said Sir John Sinclair by his said now wife, severally, respectively and successively, in the like order and course of succession, upon such trusts, and in like manner and with the like powers and for such and the like estates and interests, and with the like remainders and limitations, as is and are hereinbefore particularly mentioned, expressed, limited, directed and declared of and concerning and in relation to the hereditaments and premises hereinbefore by this my last will and testament devised."

The testator then charged all his manors, royalties &c., lands &c., in the counties of Northumberland and Durham, except such as were before devised for the benefit of his nephew William
[*911] Bosville, with the payment *of the two several rent charges after mentioned: and he proceeded: "And I do therefore hereby give and devise unto John Cockshutt, of" &c., "and his heirs, one annuity or clear yearly rent charge of 3,000*l.*, upon trust nevertheless to and for the only proper use and behoof of the said William Lee and Sophia his wife for and during the term of the joint natural lives of the said W. Lee and Sophia his wife and the life of the survivor of them: and, from and after the determination of that estate, to the use of the said John Cockshutt and his heirs for and during the natural lives of the said W. Lee and Sophia his wife and the life of the survivor of them," upon trust to preserve the contingent uses and estates after limited, but to permit W. Lee and his wife and the survivor of them to receive the said yearly rent charge to and for his or her own use: "And, from and immediately after the decease of the survivor of them, then to the use and behoof of all or any one or more of the son and sons of the body of my said daughter Sophia, and of the son or sons of such son or sons, in such shares and proportions, manner and form, and for such estate and estates, or chargeable with the payment of such sum and sums of money to the other or others of them, as the survivor of them the said W. Lee and Sophia his wife shall by any deed" &c. or by will appoint or devise. And, in default of such appointment or devise, or on determination of the estates thereby

limited, and as to such part of the rent charge whereof no appointment or devise shall be made, "then to the use and behoof of the first, second, third, and all and every other son and sons of the body of my said daughter Sophia by her present or any future husband, severally, successively and in remainder one after another *and as they or any of them shall be in seniority of age and priority [*912] of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such son and sons and the heirs male of his body lawfully issuing being always to be preferred:" And, for default of such issue, or if any such should attain 21 and die without leaving any son or sons of his body, or such son or sons should attain 21 and die without leaving issue male of his body, "or in case the said W. Lee and Sophia his wife, or either of them, shall inherit and possess any of the aforesaid hereditaments and premises in succession by virtue of the aforesaid devises, then and in any of the said cases I do order, will and direct that the said rent charge shall immediately sink into the hereditaments and premises so chargeable with the payment thereof, and thenceforth shall be annihilated and be no longer paid or payable."

"And I do also hereby give and devise unto the said John Cockshutt and his heirs one other annuity or clear yearly rent charge of 3,000*l.*, upon trust nevertheless to and for the only proper use and behoof of my said daughter Louisa Wentworth and her assigns until she my said daughter shall marry (under and with the restriction above mentioned), or for and during the term of her natural life; and, when and so soon as she my said daughter shall marry as aforesaid, then upon such trusts, and in like manner and with the like powers, and for such and the like estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations, as is and are hereinbefore particularly mentioned, expressed, limited, directed and declared of and concerning and in relation *to the aforesaid rent charge [*913] hereinbefore by this my will given or devised unto or for the benefit of my said daughter Sophia."

Then followed clauses as to payment and levying of the rent charges, powers to distrain and to work the mines if the rent charges should be in arrear: provision in case the premises charged should be insufficient &c.; bequests of interests in leases of mines &c.; and power to exchange lands &c. Then, after certain legacies (not material here), the testator continued:

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"I do also give and bequeath unto the said Thomas Richard Beaumont the legacy or sum of 5,000*l.*; And unto the said William Lee the legacy or sum of 5,000*l.*, payable and to be paid unto them respectively within twelve months next after my decease. Provided always, and I do hereby direct and declare, that, in case a separation should at any time take place between the said William Lee and my said daughter Sophia, and for the fully establishing the agreements in that behalf made" &c. "by the deed of settlement on their marriage, then and in such case all and every the several and respective devises and bequests of this my will unto or for the use or benefit of the said William Lee, and the estates hereby limited, shall, as to him, immediately cease, end and determine and be no longer paid or payable unto him; and then and from thenceforth the same" "shall go over, and they my said trustees respectively, and the survivor of them, and his heirs, shall stand and be possessed thereof" "to and for the only proper use" &c. "and sole disposal of her my said daughter Sophia," upon such of the said respective trusts, and under and subject to such and the same estates, powers, &c. as shall then remain and be capable of *taking effect; the same not to be subject to the debts, controul &c. of the said W. Lee, but the acts, deeds, receipts, &c. of the said Sophia alone, notwithstanding her coverture, to be valid to all the intents &c. of this will.

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"I do also give and bequeath unto my said daughter Louisa the legacy or sum of 10,000*l.*, payable and to be paid unto her in manner following, that is to say: the sum of 5,000*l.* upon her marriage (with such consent and approbation as aforesaid), and the sum of 5,000*l.* within two years next afterwards."

Then followed other legacies, directions and powers, not now material, and a devise in fee of trust estates and mortgages to Thomas Richard Beaumont, who was also named executor.

The avowry went on to state that Sir Thomas Blackett, afterwards, and before the time when &c., viz. on 22nd July, 1792, died seised of the said manor &c. of Hexham and manor of Anick Grange, and of the close in which &c., as, and then and still being, parcel of the demesnes of Anick Grange, and without altering or revoking his said will; and that John Cockshutt and Louisa Wentworth survived him: and that the close in which &c., from the making of the said will hitherto, hath been part of the testator's lands not therein devised for the benefit of William Bosville, and part of the lands subjected to the two rent charges.

"And the defendant further says that the said testator, at the

time of making his said will, had not, nor had he afterwards, any legitimate issue: and the said testator had for a long time, that is to say eighteen years, next before the making of the said will brought up, educated and publicly avowed and treated Diana the wife of the said Thomas Richard Beaumont, Sophia the wife of the *said William Lee, and Louisa Wentworth, in the said will respectively mentioned, as his the said testator's own daughters, and had behaved and conducted himself with great kindness and affection towards them respectively during all the period of time last aforesaid; and, at the time of the making of the said will, the said Louisa Wentworth (being then an infant within the age of 21 years, that is to say of the age of 18 years and no more, and never having been married) was resident with the said testator at his then principal mansion house, and was then publickly recognized and avowed by the said testator as his daughter, and was then treated with great kindness and affection by the said testator and as his daughter, and had not then nor from thenceforth up to the said testator's death any fortune or provision made for her or her issue otherwise than under and by virtue of the said will, as the said testator during all that period of time well knew: and the annual value of the lands and hereditaments whereof the said testator was seised in his demesne as of fee at the time of the making of the said will and thenceforth up to his death, and which are charged by the said will with the said two several rent charges of 3,000*l.* and 3,000*l.*, over and above the said two rent charges and all other charges and incumbrances thereon at the time of the making of the said will, exceeded, as the said testator then well knew, the sum of 3,000*l.* per annum: and the clear annual value of the same lands and hereditaments, and of the other lands and hereditaments which were in the said will mentioned to be devised to the use immediately after the decease of the said testator of the said Thomas Richard Beaumont and Diana his wife for their joint lives, then also exceeded, as the said testator then *well knew, the annual value of the said lands and hereditaments in the said will mentioned to be thereby devised to the said William Bosville for his life.

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[*916]

And defendant further says that the said Louisa Wentworth, not having been previously married, and long before the said time when &c., to wit on 23rd February, 1794, took to her husband one William Stacpoole: and, after the death of the said testator, and long before the said time when &c., to wit 24th February, 1795, the

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said W. Stacpoole and Louisa his wife had issue George Bosville Wentworth Stacpoole, their eldest son lawfully begotten between them: and afterwards, and before the said time when &c., to wit on 20th April, 1817, the said W. Stacpoole died, leaving the said Louisa, and the said G. B. W. Stacpoole the first and eldest son of the body of the said Louisa Stacpoole, him the said W. Stacpoole surviving: and the said Louisa afterwards, and long before the said time when &c., viz. on 19th March, 1822, took to her husband one John Clifford.

The avowry then stated that the said Louisa Clifford, after she took to husband John Clifford, and before the time when &c., viz. on 13th August, 1838, by indenture then made between the said Louisa of the first part, the said John Clifford of the second part, and the said George Bosville Wentworth Stacpoole of the third part (*profert*), and in exercise of the power of appointment given to her by the said will, appointed, immediately from and after her decease, the yearly rent charge secondly above mentioned to the use of the said G. B. W. Stacpoole and his heirs, as by the said indenture &c. And that G. B. W. Stacpoole after he had attained 21, and after the execution of the last mentioned deed and

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before the time when &c., viz. on 14th August, *1838, by indenture then made between John Clifford and Louisa Clifford of the first part, the said G. B. W. Stacpoole of the second part, and Robert Farthing Beauchamp and defendant of the third part (*profert*), granted the said rent charge secondly above mentioned, with all powers and remedies by distress for recovering the same, to the said R. F. Beauchamp and the defendant and their heirs for all the estate therein of the said G. B. W. Stacpoole, or which he could thereby grant by virtue of the limitation of the same rent charge to the first son of the said Louisa and the heirs male of his body, contained in the said will, or by virtue of the appointment expressed in the said indenture of 13th August, 1838: And that, before the time when &c., viz. on 10th January, 1841, the said R. F. Beauchamp died. That no appointment by deed or will of the whole or any part of the last mentioned rent charge was made in the lifetime of Louisa Clifford, other than the appointment expressed in the deed of 13th August, 1838. And that afterwards, and before the time when &c., viz. on 21st December, 1846, Louisa Clifford died, leaving G. B. W. Stacpoole, who is still alive, her surviving. Averment that neither Louisa Clifford in her lifetime, nor William Stacpoole in his lifetime, nor John Clifford in the

lifetime or since the death of Louisa, nor any person or persons being issue of the body of Louisa, ever inherited or became possessed of the several hereditaments and premises in the said will devised as aforesaid, or either of them or any part thereof, except the rent charge secondly above mentioned: and that from the testator's death hitherto the lands charged with the said two rent charges, whereof the testator was seised &c. at the *making of his [*918] will and until his decease, have always been of sufficient value to pay out of the rents and profits not only all other charges and encumbrances thereon but also the said two rent charges on the days mentioned in the will for payment.

The avowry then stated that 1,500*l.* of the rent charge secondly above mentioned, for one half year ending after the death of Louisa Clifford, viz. 24th December, 1846, became and was due and in arrear to defendant and remained unpaid thirty days next after the last mentioned day and before the time when &c., and was in arrear until and at that time. Wherefore defendant well avows the taking &c., as, for and in the name of a distress for the said arrears &c. Verification.

There was a second avowry, reaffirming generally all the statements of the first down to the second marriage of Louisa Wentworth, which was then stated as follows: "That afterwards, and after the said Louisa had attained the age of 21 years, viz. on" &c., "she intermarried with and took to her husband one John Clifford." It then alleged that John Clifford, after he had taken to wife the said Louisa, and before the time when &c., viz. on 14th August, 1838, by a certain indenture then made between &c. (same parties as those in the deed of the same date stated in the first avowry), which said &c. (*profert*), granted the said yearly rent charge in the said will secondly mentioned, together with all powers and remedies by distress for the recovery of the same, to Beauchamp and the defendant and their heirs for and during the natural life of the said John Clifford. The avowry then stated the death of Beauchamp, and that Louisa Clifford died, December 21st, 1846, leaving *John Clifford her surviving. The remaining state- [*919] ments were the same as in the first avowry, with the addition that, when the arrears accrued, John Clifford was alive. Verification.

Pleas in bar. To the first avowry (after *oyer* of the indenture of 13th August, 1838): That, before the marriage of the said Louisa Wentworth with the said William Stacpoole in the said avowry mentioned, viz. on 22nd July, 1792, the said Sir Thomas

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Blackett had died, and that at the time of the marriage of the said Louisa with the said W. Stacpoole she the said Louisa was an infant within the age of 21 years, to wit of the age of 19 years only, and that the said J. E. Blackett and T. Cotton in the said will mentioned were living at the time of the said marriage. And the plaintiff further saith that the said Louisa so intermarried with the said W. Stacpoole whilst she was within the age of 21 years, without the consent or approbation of the said J. E. Blackett and T. Cotton or either of them, nor was any settlement made by the said W. Stacpoole on the said Louisa previously to the said marriage. Verification.

To the second avowry: That, before the marriage of the said Louisa with the said John Clifford in the second avowry mentioned, and after the death of the said testator, viz. on 23rd February, 1794, the said Louisa intermarried with and took to husband one William Stacpoole, and the said marriage of the said Louisa with the said W. Stacpoole was her first marriage, she not having been previously married to any other person. And the plaintiff further saith that the said Louisa at the time of her said marriage with the said William Stacpoole was an infant &c. (The remaining averments were the same as in the first plea in bar.) Verification.

[920] General demurrer to each plea in bar. Joinder (1).

(1) The points stated for the defendant and the plaintiff respectively were as follows.

The defendant will contend that the plea in bar to the first avowry is bad for the following amongst other causes:

1. Because the conditions expressed in the will of Sir T. Blackett with respect to the first marriage of Louisa Wentworth under 21 were not conditions precedent to or which otherwise affected the limitations in favour of her first and other sons, but were confined to such limitations subsequent to her first marriage as were in favour of her first husband and herself and the survivor of them personally.

2. Because the limitations in favour of her sons were not confined to her sons by any particular marriage, but included her sons by her first and every subsequent marriage; and, whether the first husband did or did not comply with the above conditions, those conditions were not incorporated with or made part of the description of the class of issue of Louisa Wentworth who were objects of the limitations.

3. Because the true effect of the will as to the rent charge in question was to limit it to Louisa Wentworth for her life with remainder to her first and other sons successively in the order and for the estates designated in the will, with interposed contingent remainders in the event of a first marriage consistent with the conditions in favour of her first husband and herself and the survivor of them, with a power of appointment in such survivor amongst the sons and grandsons of the wife.

4. Because the conditions expressed in the will with respect to the marriage

The demurrers were argued in last Michaelmas Term, November 18th (1).

Butt, for the defendant:

The conditions imposed in the devise to Louisa Wentworth, namely, marriage before 21, with consent of the trustees, and the execution of a deed of settlement by the husband to their satisfaction, are not conditions precedent to the limitations taking effect in favour of her first and other sons, but affect only such limitations subsequent to her first marriage as were in favour of her first husband and herself jointly, and the survivor of them personally. No principle of law is in dispute; the question is merely of construction. The words "and, from and immediately after the decease of the survivor of them," "then to the use" &c. "of all or any one or more of the son and sons of the body of my said daughter," "and of the son or sons of such son or sons," &c., "as the survivor" &c. shall by deed or will appoint, and, "in default of

of Louisa were performed by her second marriage with John Clifford.

And that the plea in bar to the last avowry is bad because, according to the true construction of the will, a life estate in the rent charge in question was given to the first husband whom Louisa Wentworth should marry consistently with the prescribed conditions, and who should survive her; and because John Clifford answers that description.

The plaintiff will contend:

1. That, by reason of the marriage of Louisa Wentworth whilst an infant under the age of 21 years with W. Stacpoole her first husband in the lifetime and without the consent of J. E. Blackett and T. Cotton or either of them, and without any settlement having been made by the said W. Stacpoole upon her previously to her said marriage with him, the rent charge in the first and second avowries mentioned, according to the true construction of the will of Sir T. Blackett, did, upon the death of the said Louisa, sink into the hereditaments charged therewith, and become annihilated.

2. That, if it did not so sink &c., the first avowry shows no title to it in the defendant, inasmuch as, according to the true construction of the said will, the said Louisa had only power to appoint it to the use of one of her sons in tail male, and in default of such appointment it stood limited to the use of her eldest son in tail male; while the said avowry shows only an appointment by her to the use of her eldest son in fee and a grant or conveyance by him to the use of the defendant in fee, without a compliance with the particulars required by the Fines and Recoveries Act for effectually barring an estate tail.

3. That, if the said rent charge did not so sink or become annihilated, then, according to the true construction of the said will, and the facts mentioned or referred to in the second avowry and the plea in bar thereto, the defendant has not under such second avowry any title to such rent charge, the said Louisa having, previously to her marriage with the said J. Clifford and after the making of the will and the death of the said Sir T. Blackett, intermarried with and survived her first husband the said W. Stacpoole.

(1) Before Lord Campbell, Ch. J., Patteson, Coleridge and Wightman JJ.

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such appointment or devise," *then to "the first, second, third," and other sons &c., apply, in common, to the devises of rent charge
[*922] to Sophia and Louisa, and must be read in the direct and natural sense. They are not qualified by any reference to the restrictive stipulations on the subject of marriage in the devise of the Gunnerton estate. The only restrictions of that kind contemplated in any devise of the Gunnerton property are in the devise to Louisa: they are carried on, by reference, in the devise of rent charge to her; but the limitations after her death and that of her husband are independent of these restrictive conditions, as the limitations which follow the life estates in the devises to Sophia and Mr. Lee are independent of the words granting those estates. This will was under the consideration of Lord LOUGHBOROUGH in *Stackpole* v. *Beaumont* (1); and his Lordship held that the breach of condition as to marriage affected only the husband's life estate. Nothing was determined there as to the estate of the children; but the decision is a step in the present argument. Lord LOUGHBOROUGH was of opinion that the testator clearly "meant, as far as circumstances would bear it, to put Louisa precisely upon the same footing as Sophia," and to give the husband of Louisa, if the marriage were according to the conditions, a life estate, putting him in the same situation as Mr. Lee; but that, if the marriage were contrary to the conditions, his life estate should not vest; the wife's interest, however, remaining unaltered. She would take the rent charge for her life; and the limitation to her sons would, of course, take effect afterwards. The rent charges were to be a pro-
[*923] vision for the two younger *daughters and their families, the Gunnerton estates being settled upon the elder. Sir Thomas Blackett cannot have intended that, in the event of an unauthorized marriage, the sons of Sophia by that or by a subsequent marriage should be unprovided for unless they succeeded to the family estate. As was said at the Bar in *Stackpole* v. *Beaumont* (2), "not meaning to punish his daughter he could not mean to punish the children of the first marriage."

(LORD CAMPBELL, Ch. J.: He might mean, if she made some monstrous *mésalliance*, to exclude the issue of such a marriage.)

The supposition is improbable, and does not reconcile all the provisions. The argument for the plaintiff cannot stop short of the

(1) 3 R. R. 52 (3 Ves. 89). (2) 3 R. R. 52 (3 Ves. 93).

position that, unless Louisa married "as aforesaid," that is, with consent before she attained 21, the rent charge was wholly undisposed of after her death, and sank into the general estate. But the same argument which applies to Louisa's rent charge applies equally to the devise of the Gunnerton estates in her favour; and they also would be undisposed of if she did not "so" marry as the will requires, and the devises, not only to her son and sons, but to Sir John Sinclair, would fail. The intention, and the true construction, is that, whether the marriage be regular or not, the son and sons, whether of the first or a second husband, shall take; only their right is postponed if the first marriage should be according to the will, and the husband survive.

In 1 Fearne, Cont. Rem. 233 *et seq.* c. 1, s. 10 (1), the cases are considered "wherein a condition annexed to a preceding estate is, or is not, considered as a condition precedent to give effect to the ulterior limitations;" *and it is said (p. 240): "It sometimes [*924] happens, that a remainder is limited in words which seem to import a contingency, though in fact they mean no more, than would have been implied without them; or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession:" and *Holcroft's* case (2) is given as an instance. Again, Fearne says, p. 508, c. 4, s. 7, "I have already observed, that where a devise is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitation." And, among several instances, *Jones* v. *Westcomb* (3) and *Andrews* v. *Fulham* (4) are mentioned. Other examples, referred to in Mr. Fearne's treatise, are *Murray* v. *Jones* (5), *Avelyn* v. *Ward* (6): and of the same class is *Page* v. *Hayward* (7), where it was held that "express words of condition," in the devise then before the Court, should "be taken to be a limitation." The rule on this subject is also laid down in 2 Powell on Devises, 217 (3rd ed.), and in 1 Jarman on Wills, 735 *et seq.*,

(1) 10th ed.
(2) Moore, 486.
(3) 1 Eq. Ca. Abr. 245.
(4) 1 Ves. Sen. 421; cited in *Avelyn* v. *Ward*.
(5) 13 R. R. 104 (2 V. & B. 313; cited, 2 Fearne, 361).
(6) 1 Ves. Sen. 420; cited, 1 Fearne, 513.
(7) 2 Salk. 570; *S. C.* Pig. Rec. 176.

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where many authorities are collected. [He also cited *Hillersdon* v. *Lowe* (1), *Langston* v. *Langston* (2), and *Hales* v. *Margerum* (3).]

[925] If it be objected that the appointment to G. B. W. Stacpoole, being in fee, was not a good execution of the power, the answer is that, in default of appointment, he would take as tenant in tail, and that would support the first avowry. Clifford, the second [*926] husband, is still living: *but either the rent charge did not vest in him, or, if it did, the second avowry is good. But, if the devise to Louisa, and the limitations over to the issue of her first marriage, fail because of the irregularity of that marriage, it may be contended that Clifford takes the rent charge for his life, as the first husband whom Louisa married according to the will; and the second avowry is good on this ground.

Peacock, contrà:

It is not necessary to contest any principle or rule of construction, or any decision, referred to on the other side. The only question is, what the testator meant by devising the rent charge to Louisa "when and so soon as she my said daughter shall marry as aforesaid:" not what estates she and other parties took upon a certain contingency, but whether the estates vested at all. A decision bearing on the present question was given in *Clifford* v. *Beaumont* (4), on bill in equity claiming the 10,000*l.* legacy. Sir JOHN LEACH, M. R., there followed that which he considered to be the opinion of Lord LOUGHBOROUGH, namely, "that the legacy was given to the lady only in the event of her marrying under 21, with the consent and approbation of his trustees, and that, such consent not having been given, she could not be entitled to the legacy." The words of the clause bequeathing the legacy "upon her marriage (with such consent and approbation as aforesaid)" do not materially differ from those of the devise of rent charge "when and so soon as she my said daughter shall marry as aforesaid." Whatever the result might have been if Mrs. Clifford had not married before 21, and had married without consent of the trustees afterwards, here [*927] *a marriage without consent had taken place during the minority, and the stipulations of the will, as to Louisa and her son and sons, could not take effect. G. B. W. Stacpoole was not tenant in tail;

(1) 62 R. R. 126 (2 Hare, 355, 372).
(2) 37 R. R. 57 (8 Bligh, N. S. 167; 2 Cl. & F. 194); *S. C.*, as *Langston* v. *Pole* (on a case sent to the Common Pleas), 37 R. R. 57 (5 Bing. 228).
(3) 3 Ves. 299.
(4) 28 R. R. 111 (4 Russ. 325).

nor was there any power of appointment in Louisa, even assuming that the supposed power, if it had existed, was well executed. Nor can it be contended that Clifford, as the second husband, had a life interest which he could convey to Stacpoole. The testator, in each of the devises, had only one husband in view. In the devises of the Gunnerton estates to Mr. and Mrs. Beaumont and Mr. and Mrs. Lee, there was a husband already known to the testator: in devising the same estates to his third daughter, Louisa, his intention was to place "such person as she" should "first intermarry with" on the same footing with the two other husbands; except that, if the marriage took place during her minority, such first husband must have the consent of the trustees, and must make a settlement. The same intentions appear in the devises of rent charge to Mrs. Lee and her husband and to Louisa so soon as she shall marry "as aforesaid."

(COLERIDGE, J.: Suppose Louisa did not make a first marriage with consent of the trustees during her minority, but made such marriage afterwards without their consent.)

The husband would be on the same footing as Mr. Beaumont and Mr. Lee, the restrictive words applying only to the case of marriage under 21.

(COLERIDGE, J.: You must still do some violence to the literal sense of the words "when and so soon as" she shall marry "as aforesaid.")

It is clear that the testator never contemplated putting any second husband of Louisa on a level with the husbands of his other daughters. Nor could this be effected. If the first husband of Louisa had been approved by the trustees, he would *have taken a life estate; and the children of the marriage would then (in default of appointment) have taken the estate tail under the subsequent limitations. But a second husband could not take an estate for his life, there being children of the first marriage, without violence to the intention of the testator, and to the actual form of devise, according to the opinion of Lord LOUGHBOROUGH in *Stackpole* v. *Beaumont* (1). At all events his situation could not be the same as that of Mr. Beaumont or Mr. Lee. The children of each of those gentlemen would take vested remainders on his death if no

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(1) 3 R. R. 52 (3 Ves. 89).

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appointment had been made: but, according to the argument for the defendant, the children of Louisa's first husband could not, in the same event, take any vested remainder on his death, either by the devise of rent charge or by the previous devise; for she might marry again and then exercise the power of appointment.

(LORD CAMPBELL, Ch. J.: I do not think *Mr. Butt* relies much upon the second marriage being a fulfilment of the condition.

Butt: The argument arises if a literal construction is insisted upon. But the defendant's main reliance is upon a more general construction of the will; and the question upon that is, whether the stipulations as to marriage be a condition on which the limitations over depend.

LORD CAMPBELL, Ch. J.: I think that is the question; and that, looking to the testator's intention, the second marriage cannot possibly be considered a fulfilment of such condition. The plaintiff's counsel need not labour that point.)

The stipulations are a condition of the gift of life estate, and cannot cease to be one when the estate becomes enlarged.

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Butt, in reply:

In *Clifford* v. *Beaumont* (1) the MASTER OF THE ROLLS had great difficulty, and did not give a decided opinion. The husbands may not be precisely on the same footing according to the defendant's view; but there is no difference as to the issue. It has not been stated on the other side what was to be the situation of Mrs. Clifford's issue, if any, by a second marriage; whether they were excluded or not, and, if excluded, by what words in the will. The main point undoubtedly is, whether the provision as to marriage was a condition which, if broken, destroyed the subsequent limitations. This cannot have been contemplated by the testator: and the Court will incorporate those limitations with the previous devise so as to effect his intention.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (January 14th), delivered the judgment of the COURT:

In this case of *Beaumont* v. *Squire* the question for decision

(1) 28 R. R. 111 (4 Russ. 325).

arises upon the construction of a clause in the will of Sir Thomas Blackett, made in 1792.

The defendant avows for a distress made for the arrears of a rent charge created by that will: in one avowry claiming mediately under an appointment by Louisa Clifford, who, as Louisa Wentworth, was the first devisee of the rent charge with a power of appointment; in the second, under an appointment by John Clifford, her second husband; and the questions will be, whether, at the respective times of these appointments, the powers *under which [*930] they respectively professed to act existed in either of these persons.

It will be necessary, in considering these questions, to advert, not merely to the devise now to be construed, but to four other portions of the will, which may be described as the devises respectively of the Gunnerton estate, of the family estates, of two rent charges on these last of 3,000*l.* a year each (one of them the rent charge in question), and of two legacies of 10,000*l.* each. But it may be proper, in the first place, to consider the clauses which limit the two rent charges, only premising that at the date of his will Sir Thomas had no legitimate child, and that three natural daughters were among the principal objects of his bounty: Diana, then married to Thomas Richard Beaumont; Sophia, then married to William Lee; and Louisa Wentworth, then a minor and unmarried.

The devise in question is as follows: To John Cockshutt and his heirs "one other annuity or clear yearly rent charge of 3,000*l.*, upon trust nevertheless to and for the only proper use and behoof of my said daughter Louisa Wentworth and her assigns until she my said daughter shall marry (under and with the restriction above mentioned), or for and during the term of her natural life; and, when and so soon as she my said daughter shall marry as aforesaid, then upon such trusts, and in like manner and with the like powers, and for such and the like estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations, as is and are hereinbefore particularly mentioned, expressed, limited, directed and declared of and concerning and in relation *to the aforesaid rent charge hereinbefore [*931] by this my will given or devised unto or for the benefit of my said daughter Sophia."

It will be observed that this clause contains two references; the last, which relates to the trusts, powers, estates, remainders, &c., to arise upon marriage, being, specifically, to what had been expressed

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in regard to the rent charge created in favour of Mrs. Lee; the former being to "the restriction above mentioned." If, under the circumstances, these trusts, powers, estates, &c. have arisen, there is no difficulty in the construction of the clause referred to, which sets them out at length; and perhaps the only remark which it is worth while to make on it in passing is, that in case they do not arise, so that the ulterior limitations after the life estate did not take effect, there is a specific provision for the rent charge to sink into the hereditaments and premises chargeable with the payment thereof, and thenceforth to be annihilated and be no longer paid or payable. But, in the view which we take of this case, this becomes immaterial.

To ascertain what the testator intended by "the restriction above mentioned," we are remitted to the first of the four devises we spoke of above; that of the Gunnerton estate. This was, in the first place, to a nephew, William Bosville, in strict settlement, in default of appointment; remainder in the same manner to the Beaumonts and the Lees successively; remainder "to the use and behoof of Louisa Wentworth, the other of my natural daughters, or such person as she shall first intermarry with, if any (if before she attain the age of 21, by and with the consent and approbation of
[*932] the said" trustees, "or the survivor of them and his heirs, *and which person shall also previously make a competent settlement upon her my said daughter Louisa by deed or deeds in writing to the like approbation of the said" trustees), "for and during their joint natural lives, or the life of the survivor"; remainder to the trustees and their heirs for her life, "or such person as she shall so first marry, if any, and the life of the longer liver"; remainder, "after the decease of the longer liver of them my said daughter Louisa, and of such person as she shall so first marry, if any," to the son and sons of her body, "by such first or any after taken husband, with the like power of appointment, and for all such and the like estates and interests, and with the like remainders and limitations, as aforesaid in relation as aforesaid"; with a remainder over in default of such issue.

Supposing Louisa Wentworth to marry, but without fulfilling the condition imposed by this restriction, as the testator calls it, it is obvious that at least two questions with regard to the rent charge might arise: the first, as to her own interest; the second, as to her power of appointment, or, in default of appointment, the interest of her sons, if any, under the devise.

She did marry while a minor, without the consent of the trustees, and without any settlement made on her; and the first of these questions, which has some bearing on the second (that now before us), did arise, and received a judicial decision from Lord LOUGHBOROUGH: *Stackpole* v. *Beaumont* (1). He thought it very clear that she was entitled for her life to the rent charge; that neither the first husband was, nor would any after taken husband be, entitled to any interest in it. He had *further to decide, in the same case, [*933] on the claim which Louisa, then Mrs. Stacpoole, put forward to the legacy of 10,000*l.* above mentioned. The words of that bequest were as follows: "Unto my said daughter Louisa the legacy or sum of 10,000*l.*, payable and to be paid unto her in manner following, that is to say: the sum of 5,000*l.* upon her marriage (with such consent and approbation as aforesaid), and the sum of 5,000*l.* within two years next afterwards." He determined that the condition imposed by the testator was a lawful one; and that, as it had not been performed, the daughter was not then entitled to the legacy. Many years after, she, having become a widow, married Mr. Clifford, and again claimed the legacy, upon the ground that it was payable to her on marriage generally, and that the required consent and approbation applied only to a marriage under 21. Sir JOHN LEACH, M. R., however, in a short judgment, decided against the claim: and it does not appear that his judgment was ever reviewed: *Clifford* v. *Beaumont* (2).

The questions which now arise arose either not at all, or very indirectly, in the cases just referred to. Lord LOUGHBOROUGH expressly declined to make any declaration as to the children. The plaintiff, who now denies that the power ever arose or the limitations took effect, must contend either that by the words of the devise a condition precedent is created, until the performance of which no trust or power for the benefit of children arises, that condition being a marriage, while under age, with consent of trustees, and with a settlement previously made; or that, at all events, though, if the daughter had *not married while a minor, [*934] the condition might not have attached on a first marriage made after attaining full age, yet that the first marriage, whenever contracted, was so exclusively in the contemplation of the testator, that, being made in breach of the restriction imposed, it prevented the trusts and power in favour of children from ever arising. It seems to us, on full consideration, that these positions labour

(1) 3 R. R. 52 (3 Ves. 89). (2) 28 R. R. 111 (4 Russ. 325).

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under insuperable difficulties. As to the first, which relies on the literal import of the words, "when and so soon as she my said daughter shall marry as aforesaid," however specific the words "when and so soon as" certainly are, it is clearly not necessary to hold that the words "as aforesaid" incorporate all the previous conditions, or limit the marriage to the first made; for it is not an absurd or insufficient meaning to give them if we make them refer only to the mere fact of marriage before spoken of; and it is the more natural to do so because, if the sentence is construed to make a marriage before age an absolute condition precedent, the testator must be supposed to have required his daughter to marry while a minor, in such sense, that, if she remained single during that time but married after 21, her children by such marriage would be excluded. But this is a supposition so absurd in itself, so contrary to his obvious wish to guard her during minority, and to discourage her from marriage during that period by in some sort restraining her liberty as to choice and terms, and also so inconsistent with his plain scheme of making her position, so far as he could, the same as her sister Sophia's, that the construction involving it ought to be inevitable to induce us to adopt it. No one could infer, from a restraint on marriage before 21 unless under certain conditions, or at most a qualified permission
[*935] to marry *before that age, an intention so to insist on a marriage being made before that age, that all trusts in favour of children of every marriage she might at any time make were to depend on it. On the other hand, if we adopt the second supposition, we are met with this difficulty: the testator clearly distinguishes between husbands and children as objects of his bounty: only the first husband is to take interest or power; but the children of a first or any after taken husband may succeed: yet, according to this supposition, if there had been no children by Mr. Stacpoole, but there had been by Mr. Clifford, these must have been excluded; the power could not have been exercised in their favour, in spite of the manifest general intention, and some of the language, of the testator, on account of the first marriage; which certainly is a very unreasonable intention to impute to the testator: it is to deduce a very serious consequence from a cause which has no reasonable relation to it.

Lord LOUGHBOROUGH'S decision determined that the young lady herself did not forfeit her own life interest in the rent charge by the marriage which she first contracted. Looking at the words of

the previous devise of the Gunnerton estate, it cannot be doubted that he would have held, supposing the previous limitations to have failed, that her marriage did not prevent her taking those estates for life also. Now, in that case, we think it clear that, although the limitations in favour of her first husband could not have taken effect, yet those in favour of her sons by him or any after taken husband would. But, although there are slight variations in the wording, yet, as the testator, both in respect of the family estates and the rent charges, refers to the language used in respect of the limitations of the Gunnerton estate, it is *clear that in all these his intent was the same; and certainly the general words of reference in the second and third case must be construed according to the meaning of the more detailed language in the first. [*936]

It would seem, therefore, to follow that the limitations over as to the rent charge, so far as regards the sons of the marriage, will take effect; and this does no violence to the language used. If the parenthetical words "under and with the restriction above mentioned" had been omitted there, we should still have found nothing awkward or redundant in the language which follows: "when and so soon as she my said daughter shall marry as aforesaid." The words "as aforesaid" would equally, in that case, have been inserted by a conveyancer merely to refer to the fact of marriage before spoken of. There can therefore be no necessity for making them also take up the parenthetical words, and so introduce the restriction there also, for the purpose of making the limitations over depend on it as on a strict condition precedent.

Nor does any difficulty arise upon Lord LOUGHBOROUGH'S decision as to the legacy of 10,000*l*. In that case, when the intended legatee applied as Mrs. Stacpoole, she had clearly not brought herself within the words of the bequest; she was a minor, and had married, but not with the required consent and approbation: the words were too specific to be got over. In the case before Sir John Leach, when she applied as Mrs. Clifford, having married after coming to full age, it was perhaps open to her to contend that the condition was now spent; that the first marriage, if it did not itself entitle her to the legacy, yet could not prevent the effect of the second marriage; and certainly the judgment does not give any satisfactory answer to some of the arguments of her *counsel; nor are grounds satisfactory to our mind put forward by the learned Judge in support of it. Better reasons, perhaps, might be suggested for the decision from the particular language of the will, which in some respects [937]

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varies from that used in the parts we have to consider; but the authority of the case does not press us much. The MASTER OF THE ROLLS (whose judgment, as reported, is very short) seems to have thought that Lord LOUGHBOROUGH decided more than he really did decide; that he was bound by that decision; and that, if it was proper to review it, this could only be done properly on appeal from his own judgment.

We are therefore, on the whole, of opinion that the power was vested in Mrs. Clifford; and, as no objections have been made to the manner in which it was exercised, that the first avowry is good, and the plea in bar no answer to it.

Our judgment will therefore be for the defendant on this part of the record.

Judgment for defendant.

1852. *Jan.* 26.

BRIERLY *v.* KENDALL AND OTHERS (1).

(17 Q. B. 937—943; S. C. 21 L. J. Q. B. 161.)

[937]

By indenture of sale, A. assigned all his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed: interest to be paid in the meantime. It was also agreed by the deed that, after default made in payment contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them and reimburse themselves out of the proceeds, accounting to A. for any surplus: and that, until such default, it should be lawful for A. to hold, use and possess the said goods without hindrance from the assignees.

The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold, the goods assigned: but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees:

Held, that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice; and that he might therefore sue the assignees in trespass for having wrongfully entered and sold:

Held, also, that in such an action the measure of the damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass.

TRESPASS. The first count stated that defendants on 26th [*938] February, 1851, broke and entered the *dwelling-house and premises of plaintiff, and continued therein seven days. The second

(1) Cited, *Donald* v. *Suckling* (1866) L. R. 1 Q. B. 585, 597, 35 L. J. Q. B. 232; *Hiort* v. *L. & N. W. Ry.* (1879) 4 Ex. D. 188, 199, 48 L. J. Ex. 545; dist. *Mulliner* v. *Florence* (1878) 3 Q. B. D. 484, 490, 47 L. J. Q. B. 700; *Johnson* v. *Lancs. and Yorks. Ry. Co.* (1878) 3 C. P. D. 499, 507.—A. C.

count stated that defendants afterwards, to wit on 10th March, 1851, broke and entered the said dwelling-house &c. of plaintiff, and then broke &c. divers bolts, locks &c., and severed and removed certain fixtures &c., and took and converted &c. divers goods, chattels &c. of plaintiff.

Pleas. 1. Not guilty. 2. To part of the second count, that the said fixtures &c. were not the fixtures &c. of plaintiff. 3. To part of the second count, that the said goods, chattels &c. were not the goods, chattels &c. of plaintiff. 4. Leave and licence.

Replication, joining issue on the 1st, 2nd and 3rd pleas respectively: to the 4th, *De injuriâ:* issue thereon.

On the trial, before Parke, B., at the Warwickshire Summer Assizes, 1851, it appeared that, on 23rd May, 1850, an indenture of sale was made between the plaintiff of the first part, and William Kendall and George Furnival, two of the defendants, of the other part, by which, in consideration of 370*l.* 15*s.* due from the plaintiff to the said W. K. and G. F., plaintiff bargained, sold and assigned to the said W. K. and G. F., their executors, &c., all the household goods and furniture, plate, &c., "and other effects," of the plaintiff in, about or belonging to the dwelling-house and premises in question; "provided, nevertheless, that, in case the said" plaintiff, his executors, &c., "shall pay unto the said W. K. and G. F., their executors," &c., "the said sum of 370*l.* 15*s.* on the 23rd day of May *which will be in the year 1857, or at such earlier day or time as [*939] the said W. K. and G. F., or either of them, or their or either of their executors," &c., "shall appoint for payment thereof by a notice in writing to be given to the said" plaintiff, his executors, &c., "or left at his last or usual place of abode at least twenty-four hours before the day or time so to be appointed for payment as aforesaid; and shall, in the meantime, until the repayment of the said sum of 370*l.* 15*s.* at either of the periods aforesaid, pay unto the said W. K. and G. F., their executors," &c., "interest on the said sum of 370*l.* 15*s.* at the rate of 5*l.* per centum per annum by equal half yearly payments on the 23rd day of November and the 23rd day of May in every year, and also a proportional part of such interest for the fractional period of a half year, if any, which shall elapse between the last half yearly day of payment and the expiration of the notice so to be given by the said W. K. and G. F., or either of them, or either of their executors," &c., such proportional part to be paid on the expiration of such notice, and such several payments as aforesaid to be made

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without deduction or abatement, then and in such case these presents" "shall cease and be void." The deed also contained the following agreement: "After default shall be made by" the plaintiff, his executors, &c., "in payment of the said sum of 370*l.* 15*s.* and interest, contrary to the tenor and effect of the before mentioned proviso, and, in respect to the interest, after notice shall have been given by the said" W. K. and G. F., their executors, &c., to the plaintiff, his executors, &c. "or left for him or them at his or
[*940] their last or usual place *of abode, requiring payment of such interest, then it shall be lawful for the said" W. K. and G. F., their executors, &c., "peaceably and quietly to receive and take into their possession, and thenceforth to hold and enjoy, all and every the goods, chattels, stock and effects hereby assigned, and to sell and dispose of the same" at a reasonable price; and, after reimbursing themselves out of the proceeds, to account for and pay the surplus, if any, to the plaintiff, his executors, &c.: and, "until default shall be made in payment of the said sum of 370*l.* 15*s.* at the day and time hereinbefore appointed for payment thereof, contrary to the tenor and effect of the proviso hereinbefore contained, or until default shall be made in payment of the interest of the said principal sum or some part thereof on some or one of the days or times hereinbefore appointed for payment thereof, contrary to the said proviso, and until, in respect of the said interest, notice shall be given or left as aforesaid, it shall be lawful for" the plaintiff, his executors, &c., "to hold, make use of and possess the said goods, chattels," &c., "without any manner of hindrance or disturbance of or by the said" W. K. and G. F., their executors, &c.

On 25th February, 1851, about 2 p.m., the defendants Kendall and Furnival served the following notice on the plaintiff:

"To Mr. WILLIAM BRIERLY, Brinklow.

"SIR,—In pursuance of the provision in this behalf contained in an indenture or bill of sale by way of mortgage dated the 23rd day of May, 1850, made between yourself of the one part and us the undersigned Wm. Kendall and Geo. Furnival of the other part, we do hereby give you notice that we appoint the 26th day of
[*941] February instant *for the payment by you to us of the principal sum of 370*l.* 15*s.* intended to be secured by the said bill of sale, and of the interest thereon to that day; and that, in case default be made in payment thereof or any part thereof respectively, we shall proceed to act upon or carry into execution the provisions

applicable to such case under or by virtue of the said bill of sale. Dated this 24th day of February, 1851.

"WM. KENDALL. GEO. FURNIVAL."

In pursuance of this notice, the defendants afterwards entered upon the premises of the plaintiff, and committed the acts complained of. It was admitted, at the trial, that the notice was bad, not having been served twenty-four hours before the date fixed in it for payment. The jury found a verdict for the plaintiff for 189*l.* 18*s.* 6*d.*, leave being reserved to move to reduce the damages by 180*l.* (1), or for a new trial. *Macaulay*, in last Michaelmas Term, obtained a rule *nisi* accordingly.

G. Hayes now showed cause:

It will be contended, in support of the rule for a new trial, that the plaintiff could not bring an action of trespass, but should have sued for a breach of covenant. But *Fenn* v. *Bittleston* (2) is directly in point to show that, under a deed of sale by way of mortgage, containing a proviso like that in question for possession by the mortgagor, the mortgagor has the right of possession and use of the goods till default by him, and may therefore bring either trespass or trover against the mortgagee for entering and taking them. The mortgagee here has not such an absolute and *general [*942] property in the goods as draws with it the right of possession, according to the rule laid down in note (1) to *Wilbraham* v. *Snow* (3), and in *Gordon* v. *Harper* (4) and *Bradley* v. *Copley* (5). The plaintiff had done nothing to determine his right of possession, and was therefore entitled to bring trespass for what is admitted to have been a wrongful act of the defendants.

(LORD CAMPBELL, Ch. J.: The question as to a *jus tertii* does not arise in this case.)

It does not. It is clear that the right of possession is not in the mortgagee; and, in the present case, it can be out of him only by being in the mortgagor.

Then, as to the reduction of the damages, it will be contended that the measure of damages is not the value of the goods, but

(1) The value of that part of the goods seized and sold which had been assigned by the indenture. There was no defence as to 9*l.* 18*s.* 6*d.*

(2) 7 Ex. 152.

(3) 2 Wms. Saund. 47 b.

(4) 4 R. R. 369 (7 T. R. 9).

(5) 1 C. B. 685.

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the value of the plaintiff's interest in them. But, when the absolute right of possession is in the plaintiff, the defendants must be considered as wrongdoers; and the damages may be estimated at the value of the goods themselves.

(WIGHTMAN, J.: In the case of a demise of chattels for one month, could the tenant, in bringing trover for a conversion of them, lay the damages at the full value of the goods? That would be different from the case of a carrier, who might, no doubt, as trustee of the goods, lay the damages at the full value.

LORD CAMPBELL, Ch. J.: In cases like the present I think the damages have generally been assessed according to the value of the plaintiff's interest in the goods.)

There appears to be no case exactly in point.

Macaulay, contrà:

[*943] Since the decision in *Fenn* v. **Bittleston* (1), the right of the plaintiff to bring this action cannot well be questioned. But it is clear that the verdict was for too large an amount. The plaintiff's interest in the goods is the proper measure of the damages. It is for the COURT to say what is the sum to which they should be reduced.

LORD CAMPBELL, Ch. J.:

I think that this action is clearly maintainable, and that the decision in *Fenn* v. *Bittleston* (1) is correct. The mortgagee could not bring trespass or trover; the mortgagor, therefore, could; and that either against a third party who was a wrongdoer, or against the mortgagee if he became a wrongdoer by entering without having given the proper notice. I have as little doubt that the value of the goods is not the proper measure of damages. If the action had been against a third party the case would have been different; but here it would be manifestly as unjust to adopt such a test, as it would be in the case suggested of a demise of goods for one month. The parties have agreed that the Court should say to what amount the damages in respect of the goods assigned by the indenture should be reduced; and we concur in fixing it a forty shillings.

(1) 7 Ex. 152.

PATTESON, J:

I am of the same opinion. If the notice be bad, which is admitted, the plaintiff still has the right of possession, and is entitled to damages proportionate to the interest which he had in the goods.

WIGHTMAN, J. concurred.

Rule absolute to reduce the damages to 11*l.* 18*s.* 6*d.*

WEBSTER *v.* KIRK.

1852. *Jan.* 26.

(17 Q. B. 944—969; S. C. 21 L. J. Q. B. 159; 16 Jur. 247.)

[944]

W. K. being indebted to plaintiffs and to defendant, and also to a Banking Company, it was agreed between all the parties that, for the purpose of securing W. K.'s debt to the Company, defendant should draw upon W. K. three bills of exchange, payable to plaintiffs, and that plaintiffs should indorse the bills to the Company. The bills became due in 1843, and were dishonoured. In 1847 the Banking Company sued plaintiffs on the bills, and plaintiffs, in 1851, paid the amount:

Held, that plaintiffs were barred by the Statute of Limitations from suing defendant as drawer of the bills.

ASSUMPSIT. The first three counts of the declaration were on three bills of exchange respectively, drawn by the defendant on William Kirk, and payable to the plaintiffs or their order. There was a fourth count for money paid.

Plea 1. To the whole declaration, That the causes of action did not accrue within six years from the commencement of the suit. Replication: that the causes &c. did accrue within six &c. Issue thereon. 8. To the fourth count, *Non assumpsit.* Issue thereon. On the other pleas, issues were taken, not now material.

On the trial, before Platt, B., at the Yorkshire Summer Assizes, 1851, it appeared that William Kirk, in 1840, was indebted to the Yorkshire District Banking Company, and also to the plaintiffs and to his brother, the defendant. It was arranged between these parties that the defendant should draw certain bills upon William Kirk, payable to the plaintiffs, and that the plaintiffs should indorse them to the Company. This was accordingly done; the bill mentioned in the first count being one of the bills so drawn, and those mentioned in the second and third counts respectively being drawn in renewal of two others of the said bills; all three becoming due in May, 1843. All the three were dishonoured: and, in 1847, the Banking Company brought an action against the

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plaintiffs, upon the bills, which was settled, in 1850, *upon payment by the plaintiffs of principal and interest. The plaintiffs commenced the present action in 1851.

[*945]

It was contended, at the trial, that the defendant was entitled to a verdict on the issue upon the first plea, as regarded the first three counts. A verdict was taken for the plaintiffs on this issue, leave being reserved to move to enter a verdict for the defendant. *Atherton*, in last Michaelmas Term, obtained a rule *nisi* accordingly (1).

R. Hall now showed cause:

The plaintiffs are not barred. The time limited by stat. 21 Jac. I. c. 16, does not begin to run until a cause of action has accrued. By sect. 3 the personal actions there mentioned must be brought "within six years next after the cause of such actions or suit." Here the plaintiffs had no cause of action until they paid the amount of the bills to the Company. The mere dishonour of the bills, before such payment was made, would not give the plaintiffs a cause of action; that could not arise until they themselves were capable of suing in respect of such dishonour: *Murray* v. *The East India Company* (2). In that case the COURT said that "the several Statutes of Limitation being all *in pari materiâ*, ought to receive a uniform construction, notwithstanding any slight variations of phrase." If that be so, the several sections of stat. 21 Jac. I. c. 16, ought, upon the same principle, to receive a uniform construction. Now sect. 7 declares under what circumstances *any person "entitled to any such action" (as limited by sect. 3), who is an infant, a *feme covert*, insane, a prisoner, or beyond the seas, "at the time of any such cause of action given or accrued, fallen or come," may bring his suit. The words, therefore, in sect. 3, "after the cause of such actions or suit," must, looking at the language of sect. 7, be held to mean after the accruing of the cause of such action or suit. Here the plaintiffs are accommodation indorsers merely. They must be considered as co-sureties with the defendant for William Kirk's debt, and co-sureties upon the terms of the bill, that is, successive co-sureties. Until,

[*946]

(1) The verdict was also for the plaintiffs on the remainder of the record; and leave was given to move on behalf of the defendant as to this also: but the points taken as to this latter part of the record were not decided upon by the Court in Banc, it appearing that the facts were not sufficiently ascertained; and a new trial was ordered.

(2) 24 R. R. 325 (5 B. & Ald. 204).

therefore, they had been damnified by being compelled to pay, they had no cause of action, although they had, as all accommodation acceptors and indorsers have, a guarantee of indemnity in the bill itself.

(WIGHTMAN, J.: If the plaintiffs had paid the bill for their own honour in 1850, could they have sued the defendant?)

That would have given them no right of action; the right accrues on the indorser being compelled to pay, as in *Pownal* v. *Ferrand* (1).

(LORD CAMPBELL, Ch. J.: In *Murray* v. *The East India Company* (2) there was no party at all who could sue, until the plaintiff's cause of action arose: here an action might have been previously brought by the holders of the bill.)

It cannot be contended that an accommodation indorser, who is sued upon the very last day on which the Statute of Limitations permits an action to be brought against him, could have no right to bring an action afterwards against the drawer.

(LORD CAMPBELL, Ch. J.: Suppose that an *indorsee of a bill indorsed it over five years and six months after it became due; would his indorsee have six years within which to bring his action?) [*947]

His right to sue does not commence till the indorsement to him. *Savage* v. *Aldren* (3) is in favour of the plaintiffs. The drawer of a bill is under a separate contract with each indorsee to indemnify him. It is distinct from the contract entered into by the acceptor, which is only to pay the amount of the bill; and that is the reason why the drawer is liable for re-exchange, but the acceptor is not. But, to sustain an action upon a contract for indemnity, there must be a damnification: that could not arise, in the present case, until the plaintiffs had been compelled to pay the amount of the bill. The principle contended for by the plaintiffs is analogous to that laid down in *Howis* v. *Wiggins* (4). In *Brooks* v. *Rogers* (5) it was held that an accommodation party to a bill drawn by a bankrupt before bankruptcy, but paid compulsorily by such party after

(1) 30 R. R. 394 (6 B. & C. 439).
(2) 24 R. R. 325 (5 B. & Ald. 204).
(3) 19 R. R. 707 (2 Stark. N. P. C. 232).
(4) 4 T. R. 714.
(5) 1 H. Bl. 640.

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bankruptcy, is not barred by the bankruptcy. In *Houle* v. *Baxter* (1), also a case arising under the Bankrupt Acts, the principle of *Howis* v. *Wiggins* (2) is explained, and the distinction is made, in the case of a claim by an indorsee of a bill after the bankruptcy of the acceptor, between an indorsee who could previously have sued upon the bill as holder, and an indorsee who had afterwards indorsed as surety, and consequently had no cause of action until he had been damnified by having to pay the bill. *Cowley* v. *Dunlop* (3) belongs to the same set of cases.

[948] *Atherton*, *T. F. Ellis* and *Boothby*, *contrà*, were stopped by the COURT as to this point.

LORD CAMPBELL, Ch. J.:

As to the first point, we are of opinion that the plaintiffs are barred in the action on the bills by the Statute of Limitations. As to the second point, we think the rule should be made absolute for a new trial (4).

Rule absolute for a new trial.

1852. *Jan.* 14, 22, 30.

[957]

REG. *v.* THE AMBERGATE, &c. RAILWAY COMPANY.

(17 Q. B. 957—969; S. C. 16 Jur. 777.)

The prosecutor of any writ of *mandamus* may, since stat. 1 Will. IV. c. 21 (5), plead several matters to the return, by leave of the Court.

A *mandamus* the object of which is to enforce a civil right is a proceeding in aid of which, under stat. 14 & 15 Vict. c. 99, s. 6 (6), a Judge may grant an order for the inspection of documents by either of the litigant parties, when the return to the writ is traversed.

MANDAMUS. The writ recited that the above named Rail-

[*958] way Company were incorporated by *stat. 9 & 10 Vict. c. clv., local and personal, public (7), which empowered them to make a certain line of railway from a point near the Ambergate station of

(1) 3 East, 177.
(2) 4 T. R. 714.
(3) 7 T. R. 565.
(4) See p. 742, *ante*, note (1).
(5) Repealed by S. L. R. 1891; see now C. O. R., 1886, r. 136.—A. C.
(6) This section is still in force, subject to certain formal modifications effected by S. L. R. 1892; cf. R. S. C. 1883, Ord. XXXIV. r. 14.—A. C.
(7) "For making a railway from or near the Ambergate station of the Midland Railway, through Nottingham, to Spalding and Boston, with branches therefrom, and for enabling the Company to purchase the Nottingham and Grantham Canals."

the Midland Railway in the county of Derby, passing through certain places named, among which was Grantham, to Spalding in Lincolnshire, with branch lines, and an extension line to Boston in the last mentioned county: and which Act also rendered them liable, within six calendar months from the opening of the railway from Ambergate to Grantham, to make certain payments to the committees of management respectively of the Nottingham and Grantham Canal Companies, for the use of the shareholders in the said Companies respectively: and that the said sums, if not so paid, should be deemed a debt or debts due from the Railway Company to the Canal Companies respectively, and be recoverable with interest in the Courts at Westminster. The writ also recited stat. 10 & 11 Vict. c. lxxviii., local and personal, public, enabling the Railway Company to alter their line, and make a branch railway into the town of Nottingham, and to raise additional funds by creating new shares, and, after a certain amount should have been subscribed for and paid up, by borrowing. And that the times limited by statute for the completion of the Company's works and for the compulsory purchase of lands had been extended respectively by warrant of the Railway Commissioners under stat. 11 & 12 Vict. c. 8: That the railway had been completed from Grantham to Nottingham and from thence to Bulwell in *the county of Nottingham, and the portion from Grantham to Nottingham opened for public use: But that the execution of the remaining portion, for which time was granted, had been delayed, suspended and abandoned for a long and improper time &c.: That the Railway Company's whole capital, 1,900,000*l.*, had been subscribed for, and that they had power to compel payment, and also to raise money by mortgage &c.: That the completion of the railway would be of public utility, and that the shareholders in the said Canal Companies, both on that account and in respect of the payments to be made to them, and also one Henry Thompson, and other liege subjects, in respect of their residence upon and near the line of railway, had interests in its being completed: And that, before the expiration of the extended period granted by the Commissioners &c., to wit on &c., "application was duly made to" the Railway Company to take all necessary steps towards purchasing and acquiring, and to purchase and acquire, the necessary lands for making &c., and completing the unmade portion, and to make &c. and complete the same, but they neglected and refused so to do: The writ therefore commanded them to complete the said line of

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railway from Ambergate to Grantham according to the before mentioned Acts and the warrant of the Commissioners (1).

The Railway Company made a return containing many distinct allegations, and, among others: That the Company were not, in pursuance of the said Acts, authorized and empowered to make and maintain a line of railway from Ambergate to Grantham: That a [*960] portion *of the line which they are commanded to complete lies between Nottingham and Colwick in the county of Nottingham, and that the Company are not and never were authorized by any Act to make the said portion: That the line from Grantham to Nottingham and thence to Bulwell in the writ mentioned has not been made, &c., by the Company in manner &c.: That the whole of the capital of 1,900,000*l.*, in the writ mentioned, has not been subscribed for, in manner &c.: That the Company never have been able and are not able to procure the whole of the said sum to be subscribed for, and that it has not all been subscribed for according to the statute in such case &c.: A similar allegation, showing that the said capital had not been subscribed conformably to stat. 8 & 9 Vict. c. 18 (Lands Clauses Consolidation Act, 1845), sect. 16, the words of which were adopted (2): And that the Company have not, in pursuance of the Amendment Act, 10 & 11 Vict. c. lxxviii., raised, and have never been and are not able to raise, the additional capital authorized by that Act to be raised: That the only portion of the lines authorised by the Company's Acts to be made which the said Company have made is the main line between Grantham and Colwick, and that no other portion has been commenced, nor has notice been given for the purchase of lands for any other portion, nor have such lands been entered upon, &c., or any act done by the Company for the purchase, taking or using of such lands; and that such lands cannot be purchased or obtained without compulsory powers: And that the Company had not, at the *teste* of the writ or since, nor have they, sufficient funds, or power to raise sufficient funds, for [*961] making and constructing, and for purchasing *and obtaining the lands required for making &c., the railways authorized by the two last-mentioned Acts to be made.

The prosecutors took out a summons (January 7th, 1852) to show cause, at Chambers, why they should not be at liberty to plead

(1) See *Reg.* v. *Ambergate, &c. Railway Company*, 1 E. & B. 372, where the *mandamus* is more fully set forth. Also *Reg.* v. *Ambergate, &c. Railway Company*, *ante*, p. 485.

(2) See *Reg.* v. *Ambergate, &c. Railway Company*, 1 E. & B. 377.

several matters; and they delivered an abstract of the intended pleas. On the hearing, it was contended, for the Railway Company, that the prosecutors had no right to plead several defences to the same matters; and that, at all events, the 3rd, 11th and 15th of the proposed pleas ought not to be allowed. The learned Judge, however, granted an order as proposed; and a rule of Court was made accordingly in this Term (January 13th) for pleading the several pleas.

Willes, on a subsequent day of the Term (1), moved for a rule to show cause why the rule for pleading several matters should not be rescinded, or the 3rd, 11th and 15th pleas struck out (2). * * *

Cur. adv. vult.

WIGHTMAN, J. now said that the COURT saw no sufficient reason to [963] interfere with the learned Judge's order.

Rule refused (3).

Willes had also, on a previous day in this Term (4), obtained a rule calling upon the prosecutors to show cause why an order of ERLE, J., that the prosecutors should be at liberty to inspect and take copies or extracts from the books, papers, and documents of the defendants, in the said order specified, should not be discharged.

Pearson now showed cause: [964]

The order was rightly made. Sect. 6 of stat. 14 & 15 Vict. c. 99, enacts that, "whenever any action or other legal proceeding shall henceforth be pending in," among others, the superior courts of common law at Westminster, a Judge's order may be obtained by either party for the inspection of documents relating to such action or legal proceeding, and in the custody or controul of the other party, "in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party" applying for the order. The question, therefore, really is, whether proceedings by writ of *mandamus* in their present form are within those cases or not. It may be assumed that a bill of discovery can

(1) January 22nd. Before Lord Campbell, Ch. J., Patteson, Coleridge and Wightman, JJ.

(2) The argument is omitted, as the point is now obsolete; see C. O. R. 1886, r. 136.—A. C.

(3) The three pleas were demurred to, and judgment given for the Crown: *Reg.* v. *Ambergate &c. Railway Company*, 1 E. & B. 372.

(4) January 14th.

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be filed in every civil action. Now it is clear that the old action for a false return to a *mandamus* was in the nature of a civil action: and the nature of the *mandamus* is not altered by the substitution of a traverse for an action upon the return. Stat. 9 Ann. c. 20, s. 2 (1), converted writs of *mandamus* against officers of corporations into civil actions; that is shown by sect. 3, which provides that the parties making the return shall not be sued "in any other action" for the "damages" recovered under the Act. Stat. 1 Will. IV. c. 21, s. 3, expressly extends the enactments of stat. 9 Ann. c. 20, to all writs of *mandamus*. In *Rex* v. *Mayor of Glamorgan* (2) a *mandamus* to admit a freeman was held to be an action in which the sheriff ought to levy poundage under stat. 43 Geo. III. c. 46, s. 5 (3). In *Lord Montague* v. *Dudman* (4) Lord Chancellor
[*965] HARDWICKE *refused to grant an injunction to stay proceedings on a *mandamus* at common law not within stat. 9 Ann. c. 20; but that was before the extension of the statute by stat. 1 Will. IV. c. 21.

(LORD CAMPBELL, Ch. J.: In *Reg.* v. *Lords of the Treasury* (5) we held that a *mandamus* was the proper form of proceeding for recovery of the arrears of an annuity made payable out of the Consolidated Fund by statute.)

It was also held, in *In re South Yorkshire &c. Railway Company* (6), and in *Reg.* v. *Birmingham and Oxford Junction Railway Company* (7), that, where a Railway Company refused to issue a warrant for the assessment of compensation by a jury, when they were bound to do so by the Lands Clauses Consolidation Act, a *mandamus* lay to compel them. There the *mandamus* was for the purpose of enforcing a civil contract, and was, in fact, only a form of civil action. And so is the *mandamus* in the present case, for the same reason.

Willes, contrà:

The *mandamus* here is not in the nature of a civil action. The ground upon which the writ issues is a statutory obligation on the part of the Company to complete the railway.

(LORD CAMPBELL, Ch. J.: The *mandamus* is also, in effect, for the purpose of enforcing certain payments.)

(1) Repealed by 46 & 47 Vict. c. 49.
(2) 2 Smith's Rep. 8.
(3) Repealed by S. L. R. Act, 1890.
(4) 2 Ves. Sen. 396.
(5) 83 R. R. 495 (16 Q. B. 357).
(6) 14 Jur. 1093 (Q. B., Bail Court).
(7) 81 R. R. 716 (15 Q. B. 634).

The obligation to make these payments does not arise until the railway is completed. A civil claim may be involved in the proceedings; but that would not make them constitute a civil action. A writ of *mandamus* to a public Company, founded on their disobedience to an Act of Parliament, is really in the nature of a criminal proceeding: *it is for the purpose of compelling them to [*966] do that which they might be indicted for not performing. *Cartwright* v. *Green* (1) decides that a bill of discovery cannot be granted in a suit founded upon an act of the defendant which renders him liable to a criminal prosecution. Moreover, the rule in the courts of equity has always been that a bill of discovery is granted only where the party from whom the evidence is required is one of the litigant parties on the record, and therefore cannot be called as a witness: *Queen of Portugal* v. *Glyn* (2). *Fenton* v. *Hughes* (3), referred to by the LORD CHANCELLOR in that case, is a decision to the same effect. Whenever the evidence sought for can be obtained by any other method than a bill of discovery, it has not been the practice to allow a bill. The prosecutors of a *mandamus* are, in effect, witnesses, and a court of equity would not grant a bill of discovery to compel them to produce evidence.

LORD CAMPBELL, Ch. J.:

I am of opinion that this rule should be discharged. The order is made under stat. 14 & 15 Vict. c. 99, s. 6 (4), which gives what I trust will prove a very beneficial provision for compelling the inspection of documents in civil actions, the only means for obtaining which, before that Act, was the filing a bill of discovery in equity. By that clause it is provided that a Judge's order for the inspection of documents may be obtained in all cases in which a court of equity would, before the passing of the Act, have granted a bill of discovery. Now it is universally *admitted that a bill of [*967] discovery may be granted in any action or other proceeding for the recovery of a civil right. Is not the *mandamus* in the present case such a proceeding? The ultimate object of the prosecutors is to procure the payment of certain moneys: that is a civil claim; and they would therefore be entitled, in a court of equity, to a bill of discovery. The case of *Lord Montague* v. *Dudman* (5) occurred

(1) 7 R. R. 99 (8 Ves. 405).
(2) 7 Cl. & Fin. 466. (See 51 R. R. 36.)
(3) 7 Ves. 287.
(4) Repealed in part, S. L. R. Act, 1892; see R. S. C. 1883, Ord. XXXI. r. 14.—A. C.
(5) 2 Ves. Sen. 396

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before the enlargement of the provisions of stat. 9 Ann. c. 20 (1), and is no authority as to anything but the precise point decided in it. In *Reg.* v. *Lords of the Treasury* (2) we held that, if the executors of the late Queen Dowager had been entitled to receive any arrears of her annuity, a writ of *mandamus* would have been the proper form of proceeding to enforce their claim. In the same way a *mandamus* lies to compel an officer of a public Company to pay money on an award. Both these proceedings are for the purpose of enforcing a civil right; and there is no doubt that in either case a court of equity would have granted a bill of discovery. The proceedings here are of the same character, and would clearly have the assistance of a court of equity. When the case of *Lord Montague* v. *Dudman* (3) was decided, the form of proceeding upon *mandamus* was quite different from the present; the prosecutor had then to bring an action for a false return, instead of, as now, traversing the return itself. It has not been denied that under the former method a bill of discovery would lie: and there is no reason why it should not also lie under the present method, which does not change the real character of the whole proceeding.

[968] PATTESON, J.:

I am of the same opinion, and for the reasons stated by my Lord. Even under the old system of procedure, a writ of *mandamus* was often brought for the purpose of enforcing a civil right: the present system of pleading makes such a *mandamus* in fact a civil action. It has never been held that under the old system a bill of discovery would not lie; and it is clear, at all events, that it would lie under the present. I feel no doubt whatever that this rule should be discharged.

COLERIDGE, J.:

Upon a question arising under stat. 14 & 15 Vict. c. 99, s. 6, we have to decide whether the present case is one in which a court of equity would grant a bill of discovery. I have arrived, though with some hesitation, at the conclusion that it is, and that the grounds which my Lord and my brother PATTESON have given for the same conclusion are correct. The proceedings here are clearly for the purpose of enforcing a civil right: and, further, I am of opinion that, under the new system of pleading, a *mandamus* brought for

(1) Repealed by 46 & 47 Vict. c. 49.
(2) 83 R. R. 495 (16 Q. B. 357).
(3) 2 Ves. Sen. 396.

that purpose is, in fact, a civil action. If it be, a court of equity would grant a bill of discovery: and the order in question was therefore rightly made.

WIGHTMAN, J.:

I am of the same opinion. Under the joint operation of stat. 9 Ann. c. 20 (1) and stat. 1 Will. IV. c. 21 (2), any aid which a court of equity would formerly have granted in an action for a false return is now applicable where the return is traversed. It is not denied that in the former case a bill of discovery would have been allowed; it would therefore be allowed in the latter, and therefore in the present case. The objection, *that the subject of the writ of [*969] *mandamus* might also be made the subject of an indictment, does not hold where the real object of the proceeding is the recovery of a civil right.

Rule discharged with costs.

REG. *v.* BIRAM.

1852. *Jan.* 30.

(17 Q. B. 969—977; S. C. 16 Jur. 640.)

[969]

In an arbitration under sects. 25—37 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), if the umpire award, in respect of part of the landowner's claim for compensation, a larger sum than the Company offer in respect of that part, and at the same time award, as to another distinct part of the claim, in respect of which the Company offer nothing, that the landowner has suffered no damage, the landowner is entitled, under sect. 34, to those costs only of the arbitration which are incident to that part of his claim in respect of which compensation has been awarded.

PASHLEY, in last Michaelmas Term, obtained a rule calling on Benjamin Biram to show cause why a writ of *mandamus* should not issue, commanding him to settle all the costs of the arbitration between Thomas Brown Milnes and the Midland Railway Company in the affidavit of the said T. B. M. mentioned, and incident thereto, in pursuance of the statute in that behalf.

From the affidavits in support of the rule it appeared that Milnes was the owner of certain lands at Basford, and of certain wells or reservoirs on the said lands. In March, 1847, the Midland Railway Company gave a notice to Milnes, under sect. 18 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), stating their intention to take part of the said lands for the purpose of their railway, and their willingness to treat for his interest therein, and as to compensation for any damage by reason of the making of the

(1) Repealed by 46 & 47 Vict. c. 49. (2) Repealed by S. L. R. Act, 1891.

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said railway; and further that, in default of his stating, within twenty-one days, the particulars of his said claims, or treating with
[*970] the *Company, or if he and the Company should differ as to the amount of the purchase-money or compensation, the amount of such compensation would be settled in the manner provided for settling cases of disputed compensation. Milnes did not state his claims, or treat with the Company, within the time specified; and the Company, some months after the notice, took possession of the lands so required by them, pulled down certain buildings thereon, belonging to Milnes, and made their railway through. The water in the wells or reservoirs before mentioned, which were not upon, but at a very short distance from, the portion of land taken by the Company, was, as Milnes's affidavit declared, materially altered and injured in consequence of the excavations made by the Company in constructing their railway through the portion of the lands taken.

On 29th April, 1848, Milnes's attorney wrote to the surveyor of the Company as follows:

—— "Mr. M. has, he feels no doubt, received irreparable damages to one of the springs supplying his business with water, from the line passing near to or over it; in fact the spring will have to be entirely abandoned, and another sunk." —— "Will you oblige Mr. M. by giving in your valuation considered due to him?"

On 24th and 25th July, 1848, Milnes also caused two letters to be sent by his son to the surveyor, requesting compensation for the land taken and the buildings thereon pulled down by the Company: to which the surveyor replied as follows:

—— "I have received yours of the 24th and 25th as to the compensation to be allowed to your father for land taken by" the
[*971] Company. "The quantity taken is *30¼ square yards." "The plot in this instance taken being so small, I will give 25*l.* for the land, making good any damage that may have been caused."

Milnes claimed a larger amount of compensation, partly on account of the additional damage in respect of his wells, and gave a notice to the Company of his claim, and of his desire to have the same settled by arbitration, under sect. 68 of the Lands Clauses Act, putting the amount of compensation at 4,050*l.*, and stating that the Company had taken the portion of land required by them, and did "injuriously affect" "certain other lands" belonging to him by the execution of the works of the railway; stating also that his claim was in respect of "the said lands so taken and injuriously affected as aforesaid, and of" his "interest therein, and for the

damage that had been or might be sustained by" him "by reason of the execution of the works of" the railway. Arbitrators were chosen by him and the Company respectively; and the arbitrators appointed Biram as umpire. Biram's affidavit set out the substance of the award made by him, ordering that the Company should pay Milnes 44*l.*, of which 16*l.* was for the purchase of the land with its appurtenances, the rest "being compensation for the damage sustained by" Milnes "by the removing of" the buildings thereon, before mentioned, by the Company; and also adjudging and awarding "that the other lands of and belonging to" Milnes, "held by him with the said piece of land so taken by the said" Company, "were not injuriously affected by the said" Company "by reason of the execution of" their works. Biram's affidavit then went on to state "that in arriving at such last mentioned conclusion" *"he was influenced by the fact of the evidence [*972] adduced on the part of" Milnes "having wholly failed to satisfy him," "and not by any question of law." Milnes then claimed, under sect. 34 of the Lands Clauses Act, the whole costs of the arbitration. The Company objected to his claiming more than the costs of that part of it relating to the purchase of, and the damage caused to, the portion of land actually taken by the Company: and the umpire, for the purpose of raising the question of law, gave a notice to both parties, the material part of which was:

"I" "do give you notice that I am willing, so far as I have power so to do, pursuant to the statute in that behalf, to settle the costs of the said arbitration and incident thereto; but I do further give you notice that, as respects the residue of the subject-matter of the inquiry before me, which was altogether distinct from that in respect whereof I so awarded the sum of forty-four pounds as aforesaid, viz. the claim of the said Thomas Brown Milnes for compensation for certain other lands of the said T. B. Milnes, alleged by him to have been injuriously affected by the said Company by reason of the execution of the works of the said Company, and in respect of which last mentioned claim I have not awarded any compensation or sum of money to the said T. B. Milnes, because I found and determined that the said last mentioned lands were not injuriously affected by the said Company by reason of the execution of the works of the said Company, I decline to settle any costs in respect of such last mentioned inquiry, unless ordered by competent authority so to do, as I am advised that, as I have not awarded *any compensation whatever to the said T. B. [*973]

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Milnes in respect of the subject-matter of such last mentioned inquiry, the said T. B. Milnes is not entitled to any costs in relation thereto."

K. Macaulay, for the Company, and *Hugh Hill*, for Biram, now showed cause:

Milnes is not entitled to all the costs of the arbitration, but only to so much as are incident to that part of it relating to the price of the land bought by the Company, and the damage caused by them in respect of such land. Sect. 34 of the Lands Clauses Consolidation Act provides that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The word "arbitration" there means only the arbitration in respect of a claim for which the arbitrators award some amount of compensation, and was not intended to include the arbitration of claims ultimately rejected by the arbitrators altogether. Here the umpire has expressly negatived Milnes's claim for compensation in respect of his wells, by adjudging, as a matter of fact, that the land on which they stood was not injuriously affected by the execution of the Company's works; and Milnes is therefore not entitled to the costs of that part of the arbitration which relates to such claim. It cannot be said that these two subjects of claim for compensation are inseparable. Milnes's own notice to the Company treats them as distinct from *each other.

[*974]

(LORD CAMPBELL, Ch. J.: Still the Company, though disposed to give a less sum, and to give it in respect of one only of the two claims, were obliged to let both claims come before the arbitrator.)

They had no choice, unless they chose to pay the whole sum demanded as compensation, within twenty-one days.

(LORD CAMPBELL, Ch. J.: Suppose that, in the present case, the umpire had only awarded, in general terms, a sum of money by way of compensation for the lands having been injuriously affected; would the landowner have been entitled to all the costs of the arbitration?)

The umpire might perhaps, in his discretion, allow him all the

costs: but his not doing so would not be sufficient ground for a *mandamus*. But here the umpire, as regards one of the two claims, awards, expressly, nothing at all. The umpirage is, in effect, upon the other claim only. Sect. 34 recognizes only an umpirage under which some sum of money is awarded, either greater or less than, or the same as, that which is offered by the Company. It is clear that, if the Company here had offered nothing at all, and the umpire had adjudged that no injury of any kind had been suffered by the landowner, the landowner could not have recovered any costs at all: the same rule must apply as to that one of the two claims in respect of which the Company have offered nothing, and which the umpire has negatived.

Pashley and *Cleasby*, *contrà*:

The subject-matter of an arbitration under sect. 34 cannot be divided into more than one issue; it must be regarded as one general claim for compensation; and the costs incident to such arbitration cannot be separated as belonging to particular parts of that one claim.

(LORD CAMPBELL, Ch. J.: Do you *say that, if twenty claims are made, and nineteen are adjudged to be unfounded, the landowner is to have the costs of all ?) [*975]

If none of the claims are made fraudulently, he would be entitled to all the costs. In the case put on the other side, of the arbitrator adjudging that there was absolutely no claim at all, it may be conceded that the landowner would not have a right to any costs. That may be inferred from the language of sect. 68, in which a process for assessing compensation is provided for only when the party is "entitled" to some amount of compensation. But take the case, on the other hand, of fifty claims being made, and one only being adjudged unfounded. It cannot be contended that the costs incident to that one claim ought to be separated from those of the other forty-nine. Here, moreover, the umpire has awarded a certain sum as the price of the land taken, and a certain sum as compensation for some damage done by such taking. He awards, as to the residue of the alleged damage, nothing at all: that does not make the latter part of the claim in respect of damage a distinct subject-matter from the former part, even if the statute allowed of such a distinction.

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(PATTESON, J.: Is there any difference between the rule as to payment of costs under sect. 67 in cases where the landowner has not treated with the Company, and the rule under sect. 34 ?)

Not, at all events, in the case of a larger sum being awarded than that offered by the Company. In that case, under either section, the Company are to pay all the costs. The arbitration is, in fact, part of the apparatus created by the Legislature for the purpose of awarding damages to the landowner, where he is entitled to any; [*976] and the *intention, to be collected from the Act, was that this apparatus should be worked at the expense of the Railway Companies.

LORD CAMPBELL, Ch. J.:

I am of opinion that this rule must be discharged. The arbitrator seems to have been inclined to do all that justice required. The two parts of the claim appear to me to be capable of complete separation; and the umpire has treated them as separate, by allowing one and disallowing the other. That course seems to me to have been a very just and proper one.

PATTESON, J.:

The statute no doubt intended that the Company should pay the costs of the arbitration when a larger sum than had been offered by them was awarded. But it never could have been meant that the Company should pay the costs of arbitration in respect of a claim which is adjudged to be, not greater or less than, or equal to, what the Company had estimated it at, but absolutely no claim at all. As regards, therefore, that part of the present claim which the umpire has disallowed, the landowner is clearly not entitled to costs.

COLERIDGE, J.:

I am of the same opinion. No doubt sect. 34, if construed literally, would make the Company pay all the costs, whenever a larger sum than they have offered has been awarded. But we cannot adopt so strict a construction; for that would not exclude even the case of a claim made *malâ fide*. It clearly was intended [*977] to give the landowner costs only where his *claim was well founded: and I think that any claim may, if its nature permits, be fairly separated into that which is well founded, and that which is not, as has been done here. I do not, of course, mean to say that this

division is to be carried out with too great minuteness; but here, where the distinction between the two parts of the claim was broad and clear, the separation of them was perfectly proper.

WIGHTMAN, J.:

Following the sound construction of sect. 34, I think it is clear that the landowner is to have costs only where his claim is well founded. It is admitted that he would have no right to costs if his whole claim were adjudged void. Now here his claim is clearly divisible into two parts, one of which is well founded, and the other of which has been adjudged void. I think, therefore, that the umpire was perfectly right in distinguishing them, and that the landowner is entitled to costs in respect of the former part only.

Rule discharged with costs.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* BEDFORD (1).

1852. *Jan.* 31.

[978]

(17 Q. B. 978—988.)

A vestry, constituted under the Vestries Act, 1831 (1 & 2 Will. IV. c. 60), but exercising powers under a local Act (which gave them all the authorities of a public vestry), made a poor rate whereby certain amounts were charged upon a Railway Company in respect of various properties within the parish. By the local Act, a party aggrieved by any assessment might appeal to the vestry at any meeting within one month after demand of the rate, and they might give relief; and the appellant, if not satisfied with their determination, might, at any time within three months after it, appeal to the Sessions. The Company appealed to the vestry under this clause: and by agreement (September 14th, 1850) between the Company and the vestry (who authorized their chairman to sign it), the question, whether or not the property had been overrated, was referred to an arbitrator, who was to have the powers of a Court of Quarter Sessions on appeal: and, the Company having paid the rate in question, it was agreed that, if the assessment should be reduced, the amount overpaid should be credited to them on account of the next rate; that the award should regulate the assessment to all future rates up to its date; and that all payments on such future rates should be credited to the Company in the same manner as the payment already made. Pending the reference a second rate was made (September 21st, 1850), and a third in March following, both on the same rateable value as the first; and the Company paid the second.

The parties attended before the arbitrator: and he made his award (April 29th, 1851), assessing the Company's properties respectively at reduced values, and fixing the entire rateable value at an amount lower than that in dispute by 573*l.* Taking the total as correct, the Company were creditors, upon the three rates, to the amount of 418*l.*; but, by an

(1) Foll. *Leicester Waterworks Co.* v. *Overseers of Cropstone* (1875) 44 L. J. M. C. 94.—A. C.

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error of figures, the total stated in the award exceeded by a few pounds the aggregate of the sums assessable on the several properties according to the arbitrator's finding. The vestry-clerk proposed to refer the matter back to the arbitrator. The Company objected, but offered to discard the total sum and take the assessment according to the valuations on the several parcels. This was not agreed to; but no proceeding was taken to set the award aside. The vestry, of whom forty had come into office, in place of forty who retired, after the making of the award, refused to consider it as valid, and distrained upon the Company under a magistrate's warrant for the third rate on the original scale of assessment. The Company replevied, and afterwards moved this Court that proceedings might be stayed and the replevin bond delivered up:

Held that, whether the award was binding on the vestry or not, their proceeding by summons and distress was against good faith, the Company having, by their agreement with the vestry, been led into a course of proceeding which had deprived them of an appeal to Sessions. And that the proceedings of the Company in replevin might be stayed, and their bond given up, at their own instance.

PASHLEY, in this Term, on behalf of the above-mentioned Company, obtained a rule to show cause why all proceedings in this action should not be stayed, and the replevin bond therein delivered up to the plaintiffs' attorneys. The affidavits in support of the rule showed the following facts.

[979] By a poor rate for the parish of St. Pancras, Middlesex, made on 16th March, 1850, at 1*s.* 1*d.* in the pound, the plaintiffs were assessed for their land, buildings, machinery, &c., in the sum of 1,481*l.* 9*s.* 2*d.*, on an estimated value of 27,350*l.* They applied for relief under stat. 59 Geo. III. c. xxxix., local and personal, public (1) to the vestrymen (acting under that statute, but elected under stat.

(1) "For establishing a select vestry in the parish of St. Pancras, in the county of Middlesex, and for other purposes relating thereto."

Sect. 3 enacts: That the vestrymen and their successors appointed under this Act, "shall have, in addition to the several powers and authorities by this Act expressly given to and vested in them, all such powers and authorities whatsoever as have heretofore been lawfully vested in or exercised by the open or public vestry of the said parish."

Sect. 95 enacts: That, if any person or persons shall think himself &c. aggrieved by any rate &c., under this Act, such person "shall apply for relief to the said vestrymen, at any meeting to be held within one calendar month next after demand made of such rate" &c.; "and the said vestrymen are hereby authorized and empowered (if they shall think such person or persons aggrieved), to give such relief in the premises as to them shall seem necessary; and if such person or persons shall not be satisfied with the determination of such vestrymen, he, she, or they shall be obliged to pay such rate" &c., "and then he, she, or they may appeal to any Quarter or General Sessions of the peace to be holden for the said county of Middlesex, within three calendar months next after such determination of the said vestrymen," first giving notice &c., and entering into recognizance &c.; and the Sessions shall hear and determine the matters of such appeal; and their determination shall be final.

1 & 2 Will. IV. c. 60), and contended that their assessment ought to be reduced to 14,033*l*. They also intimated that their object was to place themselves in a position for appealing at the Quarter Sessions, but that they should be willing to have the question settled by arbitration. The vestry took time for consideration, and, after consulting professional valuers, resolved, at a meeting held on 17th July, 1850, to adopt the proposal of an arbitration. *This [*980] resolution they, by their vestry-clerk, communicated to the plaintiffs on July 26th. An arbitrator was agreed upon, and an agreement of reference drawn up, and signed by the chairman of the vestry. The attorney for the Company expressed a doubt whether such signature were sufficient, unless the agreement were also signed by a quorum of the vestrymen: but the vestry-clerk referred to sects. 13 and 14 (1) of the local Act, and gave a copy of a resolution (September 14th, 1850) by which the vestrymen assembled, to the number of 33, had directed their chairman to sign on their behalf. The chairman did accordingly sign and seal the agreement of reference, to which the Company also put their seal.

The agreement purported to be made (14th September, 1850) between the London and North Western Railway Company of the first part, and the vestrymen appointed under the above mentioned local Act of the other part. It recited the making of the rate, the Company's appeal *to the vestry, and that they refused to alter the [*981] assessment (2): "And whereas it was afterwards considered that, instead of proceeding by appeal to the Court of Quarter Sessions for the county of Middlesex to determine whether the said Company

(1) Stat. 59 Geo. III. c. xxxix. s. 13, enacts: "That no act of the said vestrymen shall be or be deemed to be good or valid, unless the same shall be done at some meeting to be holden in pursuance of this Act (save and except as may be herein excepted); and all the powers and authorities by this Act granted to or vested in such vestrymen shall and may from time to time be exercised by the major part of them present at any such meeting (the number of such vestrymen present at such meeting not being less than seven), and all the orders and directions of the major part of such vestrymen present at such meeting shall have the same force and effect as if the same were made or done by all such vestrymen for the time being (save and except as may be herein excepted);" and at every such meeting, if the vicar be not present, a chairman shall be appointed, and shall have a casting vote. See stat. 1 & 2 Will. IV. c. 60, sects. 27, 28.

Sect. 14 provides for entering all acts, orders and proceedings of the vestrymen at each of their meetings in a book; which entries shall be read at the next meeting, and, being signed by the chairman of such meeting, shall be deemed originals, and shall be evidence in all Courts &c.

(2) An affidavit on behalf of the plaintiffs denied that, in fact, the vestry ever did refuse, or come to any actual decision on the subject.

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were over-rated by reason of the before-mentioned assessment, it would be reasonable and expedient to refer the matter in difference to an arbitrator: And whereas it has been agreed between the said Company and the said vestrymen that the said matter in difference, namely the question whether the Company are over-rated in the said assessment, shall be referred to" &c. (a barrister) upon the terms &c. after mentioned: "Now these presents witness" &c. It was then witnessed, and declared and agreed by and between the said parties, that the said matter in difference, namely the said question whether &c., should be referred to the said arbitrator, who should have and exercise in reference thereto all the powers which the General or Quarter Sessions might have had on appeal against the said rate under the local Act: and that the award should be final and conclusive &c., and that both parties would abide by and perform the same; and that the agreement and award might be made a rule of Court. "And it is hereby further agreed that, inasmuch as the said Company have paid the full amount of the rate charged upon them in respect of the before-mentioned assessments on the several properties hereinbefore described, if the arbitrator shall award that the assessment on any of such properties shall be reduced, the amount so overpaid shall be credited to the [*982] Company on account of the next succeeding rate. *And lastly it is hereby agreed that the award of the said arbitrator in reference to the said assessment of the 16th of March, 1850, shall regulate the assessment to any future rates which may be made by the said parish up to the date of such award; and that all payments made by the Company in respect of such future rates shall be treated and considered as payments on account, in the same manner as the payment already made in respect of the present rate."

The parties attended before the arbitrator and went into their proofs; and he, on 29th April, 1851, made and published his award, which was taken up by the vestry-clerk on behalf of the vestry. The award assigned certain rateable values to the Company's property subject to assessment in different parts of the parish, and concluded by a finding, that the Company were over-rated by the assessment in question, and that the sum payable by them should be reduced to 908*l.* 8*s.* 3*d.*

Between the date of the agreement and that of the award, two other rates were made (11*d.* in the pound on 21st September, 1850, and 10*d.* in the pound on 22nd March, 1851) on the same rateable value (27,350*l.*) as the said rate of 16th March, 1850; and, in

consequence of the stipulations in that behalf in the agreement of reference, the Company had paid the rate of September 21st; but that of March 22nd remained unpaid. Calculating the amount of the two rates paid by the Company (16th March and 21st September, 1850) on the assessable value as reduced by the award, they had overpaid to the amount of 1,100*l.* on those two rates, and the balance exceeded, by 418*l.* 15*s.*, the amount due on the third rate, at the reduced estimate.

A committee of the vestry reported to them (on 25th June, 1851) the result of the arbitration, and recommended *that a payment [*983] should be made to the Company, and the assessment reconsidered at the next rating; which report the vestry adopted. At an interview some time after the making of the award, the vestry-clerk observed to the Company's solicitor that there was some mistake in the award; for that the sum fixed thereby as payable by the Company in respect of the assessment differed from the sum which the rate would amount to if calculated at 1*s.* 1*d.* in the pound on the rateable value of the several properties referred to in the award: but no intimation was given that the vestry intended to dispute the award. The Company's solicitor, in July, called upon the vestry-clerk for a settlement of the accounts, and proposed (July 17th) to take the figures at which the arbitrator assessed the rateable value of the different properties, and consider such part of the award as referred to the total amount immaterial. The vestrymen, on July 18th, served the Company with a summons to pay 1,139*l.* 11*s.* 3*d.*, alleged to be due on the rate of March 22nd, 1851. The parties, in September, 1851, attended before a magistrate; and the vestrymen contended that the award was invalid and the rate of March 22nd due, and that no money had been paid specifically in discharge of the particular rate. The magistrate, as there was a dispute on the award, declined to take notice of it, and issued a distress warrant. A seizure was made; and the Company replevied.

The vestry-clerk made affidavit in answer, stating that, after the last hearing before the arbitrator, the deponent requested him to appoint another meeting for the purpose of enquiring into the accuracy of certain estimates and calculations which had been put in on behalf of the Company, and which deponent, in his communication to the arbitrator, alleged to be erroneous: that the arbitrator sent an answer declining to make such appointment, *inasmuch as the Company's counsel, to whom he had spoken, [*984]

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objected to a re-opening of the case: that the arbitrator had in fact under-estimated the Company's property, and that there was a mistake on the face of the award, as the arbitrator therein made the rateable value of the Company's premises 16,463*l.*, but fixed the rate payable in respect of them at 908*l.* 8*s.* 3*d.*, which was not the correct amount at 1*s.* 1*d.* in the pound: that deponent suggested to the Company's solicitor that the award should be referred back to the arbitrator, which was declined on behalf of the Company, and they insisted that the rateable value, as fixed by the arbitrator, should stand, and the amount of rate, as calculated by him, be disregarded: that deponent then said that, if they persisted in such refusal, the vestry would contest the validity of the award, and levy the last rate under a magistrate's summons; to which the Company's solicitor answered that they should then replevy and try the right: That, in May, 1851, forty vestrymen were elected for the parish, under stat. 1 & 2 Will. IV. c. 60 (Sir J. Hobhouse's Act), in the room of forty who then retired: "That the said newly elected vestrymen, without desiring to disturb the arrangements of their predecessors as to any rates already paid by the said Company, declined to admit the fairness and justice of the assessment which the said William Wagstaff " (the Company's solicitor) " insisted the vestry was bound to adopt by virtue of the said award:" and that deponent, on 18th July, 1851, informed the said W. W. " that the vestry, as then constituted, disputed the validity of the said award, and had come to the conclusion that they were not bound to adopt the construction of it which he had suggested on the part of the said Company;" and that they had
[*985] determined to cause the *Company to be summoned before a magistrate for the purpose "of trying the validity of the said award, and ascertaining whether the construction which the said Company insisted should be put upon the said award was correct or not." The affidavit then stated the proceedings on the summons, and upon the execution of the warrant.

Crowder, *Bramwell* and *Bagley* now showed cause:

The plaintiffs in replevin are calling upon the Court to stay their own proceedings.

(COLERIDGE, J.: Both parties are actors.)

The ground of motion is that the proceedings in contravention of the award are a breach of faith. It must be admitted that the

award stands unreversed, no motion having been made to set it aside: but the parishioners are not obliged to adopt it. The vestrymen who agreed to be bound by it could not bind their successors.

(LORD CAMPBELL, Ch. J.: The conduct pursued is very disgraceful to the parish.

COLERIDGE, J.: Who could deal with a parish which acted upon such views?)

The vestry stand upon their right. They are differently constituted from the vestry which consented to the reference, and may consult what appears to them to be the good of the rate payers. It has been decided that overseers cannot submit the amount of a rate to arbitration without the intervention of justices: *Thorp* v. *Cole* (1).

(LORD CAMPBELL, Ch. J.: The question here turns upon the good faith. The Court constantly stays proceedings against which there is no legal defence, because they are against good faith.

COLERIDGE, J.: By agreeing to a reference you have led the plaintiffs out *of their direct course of defence. [*986]

WIGHTMAN, J.: They would have sought their remedy long since, by appeal.

LORD CAMPBELL, Ch. J.: An individual would have been bound by the agreement as the plaintiffs seek to bind you: a parish must be considered as a corporation for this purpose. You have to contend that the award, even if unobjectionable, would not bind you. As to the good of the rate payers, an arrangement of this kind may be very beneficial to them, as it was in *The Tilehurst* case (2).)

The plaintiffs would have a right of action on the agreement if the award were valid. They might have appealed notwithstanding the agreement. It is true that the defendants have not moved to set the award aside; but there are two modes of trying the validity of an award: to move that it be set aside, or to put the opposite party under the necessity of enforcing it.

(1) 41 R. R. 733 (2 Cr. M. & R. 367; *S. C.* 5 Tyr. 1047). Judgment affirmed in Ex. Ch.; *Thorp* v. *Cole*, 41 R. R. 749 (1 M. & W. 531; *S. C.* 5 Tyr. 1064).

(2) *Reg.* v. *Great Western Railway Company*, 81 R. R. 636 (15 Q. B. 379, 1085).

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(COLERIDGE, J.: It is not trying the validity of an award to say that no award can bind you.

LORD CAMPBELL, Ch. J.: Your argument is that each party might have treated their agreement as a nullity, if it suited their interest.)

That is the legal argument; but the facts afford some equitable ground for the course taken by the defendants. The morality of the proceeding, however, is not in question. If the Court interfere in this instance, will they always interfere in similar cases? Or at what degree of dishonesty will they draw the line? It is better that some moral wrong should be done in an individual case than that such questions should recur. Parties should not be encouraged to bring replevin, and execute a bond, for the direct purpose of having their proceedings set aside. Stat. 3 & 4 Will. IV. c. 42, s. 39, renders a submission to arbitration irrevocable (except as
[*987] there mentioned) if it can be made a *rule of Court: but this submission could not be made a rule of Court; nor has there been any application for that purpose.

Pashley, contrà:

The submission to reference was fully acquiesced in by the vestry in July, 1850, and their powers, under stat. 59 Geo. III. c. xxxix. s. 3, are entirely different from those of an overseer: this case, therefore, is not governed by *Thorp* v. *Cole* (1), which, moreover, does not touch the question of good faith. Stat. 1 & 2 Will. IV. c. 60, under which the vestry are elected, does not affect this case: the right of appeal to the vestry and from them to the Sessions, under s. 59 of the local Act, remained unaltered.

(PATTESON, J.: The Company have paid the whole rates of March and September, 1850.)

(*Pashley* was then stopped by the COURT.)

LORD CAMPBELL, Ch. J.:

This rule must be absolute. The conduct of the parish has been extremely disreputable. The agreement entered into was most advantageous for the parishioners and for the Company: the stipulation for payment of a certain sum, to be credited to the

(1) 41 R.R. 733 (2 Cr. M. & R. 367; *S. C.* 5 Tyr. 1047).

Company in their ultimate account with the parish, was a reasonable one, and to be enforced if we possibly can do so. The parish deprived the Company of their appeal, and inveigled them into a wrong course, if the vestry did not intend to go through with the reference. An award is made, showing that the Company have overpaid: then the vestry determine, not that they will move to set aside the award, but that they will hold the proceeding at defiance: and they distrain for a rate made pending the reference, on the scale of *the former assessment. The conduct is most dishonourable: and the only question is upon our right to interpose. I think that we have that right, on the ground that the vestry have deprived the Company of an appeal, and that it was a violation of their agreement to institute such proceedings as have brought about the action which we are now called upon to stay. Under the peculiar circumstances of the case, this rule must be absolute.

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PATTESON, J.:

Without deciding whether or not this agreement bound the present vestry, I think it clear that, under the circumstances which have taken place, the rule ought to be absolute.

COLERIDGE, J.:

There are certain instances in which the Courts have interfered when proceedings have been taken in violation of good faith: and, if ever there was a case for such interference, it is this. By the transaction stated to us, the vestry have gained an opportunity of making a rate without appeal. Can they now depart from the terms held out at that time, and say that the Court shall not interpose?

WIGHTMAN, J.:

This is in form an action at the suit of the Company; but it may be treated as, in effect, an action by the parish to enforce a rate. The very ground on which we have interfered in former cases to stay proceedings is that the party applying had no legal redress, but would be subject to injustice by a breach of faith if the action went on. Here the defendants have acquired a benefit at the expense of the Company, which they would not have had but for the transaction which they are seeking to annul.

Rule absolute.

1852.
Jan. 13, 27.

DRIVER *v.* THOMAS BURTON.

(17 Q. B. 989—994; S. C. 21 L. J. Q. B. 157.)

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A. applied to D. and S., who were in partnership, for a loan. D. and S. gave him an acceptance by D. alone; and A. signed an acknowledgment, in which he declared that, if he discounted D.'s acceptance, he would remit his own acceptance to D. and S. A. did get D.'s acceptance discounted, but did not remit his own acceptance. D. was afterwards sued by the holder of his acceptance, and paid the amount out of the partnership funds:

Held, that D. was entitled to sue A. for money paid to his use, upon an implied contract by A. to indemnify him, arising upon D. being compelled to pay the acceptance: and that S. need not join in such action, although, if an action had been brought against A., on the written agreement, for not remitting the cross acceptance, S. must then have been a co-plaintiff.

ASSUMPSIT for money paid, and on an account stated. Plea, *Non assumpsit.* Issue thereon.

On the trial, before Lord Campbell, Ch. J., at the London sittings after last Trinity Term, it appeared that the plaintiff and a person named Sheppard were in partnership together: and that, in November, 1850, the defendant's son applied to them for a loan of 100*l.* The plaintiff gave him a bill accepted by the plaintiff alone; and defendant's son signed the following memorandum:

"SOUTHAMPTON, November 24th, 1850.

"I hereby acknowledge that I have received from Messrs. Driver and Sheppard Mr. Driver's acceptance for one hundred pounds (100*l.*) at three months from this date; and, in case I discount it in town, I will remit them my acceptance for the same amount and at four months.

"Pro THOMAS BURTON. FREDERICK BURTON."

The defendant got the plaintiff's acceptance discounted, but did not remit his own. The plaintiff was sued upon his acceptance by a third party, who was the holder; and he paid the amount out of the partnership funds. He then brought the present action to recover such amount. It was objected that Sheppard should have been a co-plaintiff, and also that an action for money paid did not lie. The LORD CHIEF JUSTICE directed a nonsuit to be entered,
[*990] leave being reserved to the plaintiff to move to *set aside the nonsuit, and to enter a verdict for the plaintiff.

Watson, in last Michaelmas Term, obtained a rule *nisi* accordingly. In this Term (1).

(1) January 13th. Before Lord Campbell, Ch. J., Patteson, Coleridge and Wightman, JJ.

Knowles and *Dodsworth* showed cause:

The action should have been by Driver and Sheppard jointly. The present action assumes an implied agreement between the plaintiff and the defendant, that the defendant should repay to the plaintiff the amount of his acceptance. But, first, it is clear, upon the evidence, that such implied agreement, if it existed at all, was not between the plaintiff and the defendant alone, but between the plaintiff's firm and the defendant. The acceptance was by Driver alone; but it was given in consequence of an application to Driver and Sheppard. The effect of the transaction is the same as if Driver and Sheppard had given the acceptance of any third party. Secondly, such implied agreement would arise only upon Driver having to pay the amount of his acceptance; but it is paid, not out of Driver's money, but out of the partnership funds. The action, therefore, ought to be by both partners jointly, inasmuch as they have a joint interest and a joint liability: *Slingsby's* case (1), *Osborne* v. *Harper* (2), *Anderson* v. *Martindale* (3). The non-joinder of Sheppard is not a merely technical point: if Sheppard had joined, the defendant would have been able to plead a set-off against the firm, which he is now precluded from doing. Moreover, an action for money paid does not lie under these circumstances. *Any [*991] implied agreement is destroyed by the special agreement contained in the memorandum signed on behalf of the defendant; and it is upon that special agreement by the defendant to remit his acceptance that the action should have been brought: *Buckler* v. *Buttivant* (4).

(COLERIDGE, J.: The special agreement, on the face of it, is with another party.)

The consideration upon which the acceptance of the plaintiff is given is the remitting of the defendant's acceptance; the implied agreement, therefore, to repay the amount of the plaintiff's acceptance is excluded, and an action for money paid will not lie. *Toussaint* v. *Martinnant* (5) is in point. It is true that in the present case the cross acceptance was not given as in *Buckler* v. *Buttivant* (4); but the result of the special agreement to give a cross acceptance is the same as in that case; the action can be only upon such special agreement.

(1) 5 Co. Rep. 18 b.
(2) 7 R. R. 696 (5 East, 225).
(3) 6 R. R. 334 (1 East, 497).
(4) 3 East, 72.
(5) 2 T. R. 100.

DRIVER v. BURTON.

Watson and *Maynard, contrà:*

The plaintiff is entitled to sue alone. The money was paid by him to discharge his own separate liability. It is contended that the action can be brought only by those with whom the original contract was made. But that is not so; if the acceptance had been given by Driver and Sheppard, and Driver alone had been compelled to pay, Driver might have sued alone. *Osborne* v. *Harper* (1) is not in point: there was no joint payment here. The party who paid the amount of the acceptance was Driver alone, although he drew upon the partnership account.

(LORD CAMPBELL, Ch. J.: Is it not practically the same as if both partners had paid?)

The money was paid out of the partnership account; but it
[*992] was paid to discharge *Driver's liability only. The action was against him alone; he had no defence, and paid the money out of a fund which was under his controul. The nature of that fund is not material; the real question is whose liability was discharged by the payment.

(LORD CAMPBELL, Ch. J.: If it was a separate transaction with Driver, it would not signify with whose money the payment was made.)

It is a separate transaction as regards the acceptance, though not as regards the special agreement.

(LORD CAMPBELL, Ch. J.: As between Driver and the holder of the acceptance, Driver alone was liable; as between Driver and the defendant, Driver appears to have acted with Sheppard throughout.)

That may be so; but the plaintiff is not suing upon the special agreement. It is contended, but not correctly, that the action should have been upon such special agreement, and that an action for money paid will not lie. An action for money paid lies in three cases: first, where the plaintiff pays at the request of the defendant; secondly where the plaintiff (as here) pays, by compulsion, a debt for which, as between himself and the defendant, the defendant is primarily liable; thirdly, where, there being no original debt, the plaintiff is compelled by the wrongful act of the defendant to pay. The acceptance of Driver was,

(1) 7 R. R. 696 (5 East, 225).

substantially, an accommodation acceptance, the consideration upon which it was given having failed. The defendant agreed to give a cross acceptance by way of indemnity. He did not do so: and he was therefore bound to pay the amount of Driver's acceptance upon its maturity. He did not pay it; and Driver was consequently compelled to pay that which the defendant ought to have paid. The defendant is therefore liable to an action for money paid, at the suit of Driver. The default of the defendant in not remitting his cross *acceptance destroyed the special contract, and created an implied contract to indemnify Driver for his compulsory payment.

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(LORD CAMPBELL, Ch. J.: I understand you to say that, if the defendant had given his cross acceptance, he would not have been bound to take up Driver's.)

That is so. When he failed to give his cross acceptance, and the plaintiff was thereupon compelled to pay, the implied contract arose: *Bleaden* v. *Charles* (1), *Asprey* v. *Levy* (2) (recognized in *Hooper* v. *Treffry* (3)).

(LORD CAMPBELL, Ch. J.: It is much the same case as where a lessee assigns, and the lessor, through default of the assignee, is compelled to make a payment which the assignee should have made.)

In that case the lessor may have an action for money paid against the assignee, provided there was no original obligation on the lessor to pay. The rule appears in *Spencer* v. *Parry* (4). It is objected that there was no privity between the plaintiff and the defendant. But the decision in *Hooper* v. *Treffry* (3) shows that the fact of the plaintiff's acceptance being given to the defendant at his request creates a sufficient privity between the two. As to the argument that the defendant cannot plead a set-off, owing to the non-joinder of Sheppard, it is clear that he could not at any rate have pleaded it upon the present contract, which is simply a contract to indemnify.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., on a subsequent day of the Term (January 27th), delivered judgment:

The defendant wanted an advance of money from Driver and Sheppard. They, instead of money, sent him an acceptance of

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(1) 7 Bing. 246.
(2) 73 R. R. 738 (16 M. & W. 851).
(3) 74 R. R. 578 (1 Ex. 17).
(4) 3 Ad. & El. 331.

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Driver alone. The defendant agreed that if he discounted that acceptance he would give his own acceptance to Driver and Sheppard. He did discount Driver's acceptance, but did not give his own. Afterwards Driver was sued by a holder on his acceptance, and paid the money out of the funds of Driver and Sheppard. He then brought this action against the defendant for money paid. The question is, whether Sheppard ought to have been a co-plaintiff.

If this had been an action on the agreement itself, doubtless Sheppard must have been joined as a plaintiff. But, when the defendant refused to give his acceptance according to the agreement, it appears to us that the acceptance of Driver became one without consideration for the accommodation of the defendant; and thereupon a new implied contract arose by law on the part of the defendant to indemnify the accommodation acceptor, that is, the plaintiff Driver alone. He alone could be liable to the holder of the bill; and he alone was sued: and, although the money he paid to take up his acceptance was that of himself and Sheppard, yet we think that it was his payment as much as if he had borrowed the money from his bankers or any stranger.

If, under the new state of things, when the defendant had refused to give his acceptance, he had in fact requested Driver and Sheppard to take up Driver's acceptance, he might have been liable to both for money paid: but, in the absence of any such request, we think that the legal right to sue for money paid must depend on the legal liability; and that was in Driver alone.

Rule absolute.

1852. *Jan.* 16, 20, 29.

REEVES *v.* WHITE (1).

(17 Q. B. 995—1017; S. C. 21 L. J. Q. B. 169; 16 Jur. 637.)

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Declaration, in covenant, set out an indenture of mortgage between the trustees of a Benefit Building Society and defendant, a member, by which, in consideration of 600*l.*, appropriated and paid to defendant in respect of his shares, defendant mortgaged certain land to the trustees, for the use and benefit of the Society, and covenanted to observe all the rules of the Society, and to make all payments, in respect of his shares, which were required by the said rules. Breaches: 1, that defendant did not pay certain monthly instalments, according to rule 19; 2, that he did not pay the subscriptions upon his said shares, according to rule 13; 3, that he did not pay certain fines incurred by him, under rules 13 and 14, by non-payment of the said instalments and subscriptions.

Pleas: 1, That rule 33 provided that "the directors shall decide upon all disputes that may arise between this Society and any member," "respecting

(1) Cited, *Callaghan* v. *Dolwin* (1869) L. R. 4 C. P. 288, 294, 38 L. J. M. C. 110; *Huckle* v. *Wilson* (1877) 2 C. P. D. 414.—A. C.

the construction of or any omission in these rules, or respecting any other matter relating to this Society and such member;" "and the decision of the directors, if satisfactory to both parties, shall be conclusive; but, if not satisfactory such dispute shall be referred to arbitrators, pursuant to stat. 10 Geo. IV. c. 56, s. 27 (1). That the causes of action were matters in dispute between the Society and defendant as a member, respecting matters relating to the Society: that arbitrators were duly appointed according to the said rules, and continued to be arbitrators thenceforth &c.: and that defendant never had notice of or assented to any decision of the directors, and had always been ready and willing, as the directors and the plaintiffs well knew, to refer the said matters to the said arbitrators. Verification.

2. That rule 18 declared That, before any member should be allowed to receive the amount of the appropriation mentioned in the rule, he should deliver to the manager a statement in writing containing the nature and situation of the premises intended to be offered as security, and, if, after a survey, and report made to the directors, they were satisfied that the premises were sufficient security, they should have the title examined and approved, and then 200*l.* should be advanced by the Association upon the member executing a mortgage to them of the property purchased by the appropriation, or other property. That rule 19 provided that, if, after execution of a mortgage, a member failed, for six monthly nights, to pay and observe all subscriptions, payments and regulations, the directors should appoint a person to collect the rents and profits of the premises; and, if these were insufficient, or if the member refused to allow or empower such collection, or, if required, himself to collect and pay, the directors were empowered to sell the property mortgaged. That the present causes of action were in respect of subscriptions and other payments, due from defendant for more than six calendar months after the execution by him, as a member, of the mortgage deed: and that defendant, after his execution of the deed, neglected for six monthly nights to pay and perform his subscriptions, payments and regulations. That the mortgaged premises always had been and were sufficient security: and that, if the directors had appointed a person to collect the rents and profits, the proceeds would have sufficed to discharge all costs of collection, and reimburse to the Association all the said subscriptions and other payments. And that defendant had always been ready and willing to allow and empower such collection; but that neither the directors nor the trustees had appointed any person to collect the said rents and profits, or required defendant to collect them himself. Verification.

Replication to plea 1, That the rules were duly certified, allowed and enrolled, and the first meeting of the Society after such enrolment was held, before defendant became a member or executed the mortgage deed. That, by accident, mistake and oversight on the part of the Society and its officers and members, no arbitrators were elected or appointed, according to rule 33, at such meeting or afterwards; and that, when defendant became a member, and when the causes of action accrued, and at the commencement of this suit, there were no arbitrators to whom any such matters as mentioned in the said rule could be referred. Without this, that arbitrators were duly appointed &c.:

Held, on demurrer to the replication to plea 1:

1. That the declaration showed a right of action in plaintiffs as

(1) Friendly Societies Act, 1829, repealed by 18 & 19 Vict. c. 63, s. 1, but without reference to 6 & 7 Will. IV. c. 32, which incorporates this Act so far as applicable to Building Societies.—A. C.

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trustees, under stats. 6 & 7 Will. IV. c. 32, s. 4 (1), and 10 Geo. IV. c. 56, s. 21 (2):

2. That plea 1 was good, inasmuch as the summary remedy provided by the statutes for the settlement of disputes by arbitration is exclusive, and ousts the superior Courts of jurisdiction:

3. That the traverse, in the replication to plea 1, of the allegation that arbitrators had been duly appointed, was a sufficient answer to the plea.

Held, also, on demurrer to plea 2, That plaintiffs were entitled to judgment, inasmuch as the power to collect rents, or to sell, given to the directors by rule 19, did not prevent bringing an action on the express covenant to pay the subscriptions.

COVENANT. The declaration stated that, after the passing of [*996] stat. 9 & 10 Vict. c. 27 (3), the above named *Association, being a Benefit Building Society, was formed and established in pursuance of the statutes then in force, and then made certain rules for its government, which were afterwards duly certified, allowed and entered, in pursuance of the statutes in that behalf; and which said rules &c. The count then recited certain of the rules, as follows.

3. That the first meeting of this Society should be held to receive subscriptions and other moneys on the 11th February, 1847, at the Literary Institution, Borough Road, in the county of Surrey, where the future meetings of the Society were to be held on the second Thursday in every succeeding month between the hours of seven and nine o'clock in the evening, or at such other times and places as the board of directors might from time to time appoint; but, should the last meeting fall on Christmas Day, the subscriptions &c. should be payable on the following day.

6. That all deeds, writings, and securities to and from the Society should be made and taken in the names of the trustees. That, when the trustees should be required to commence or defend any action, suit, or prosecution in law or equity, they should receive at the expense of the Society a bond of indemnity from the directors, who were thereby empowered to execute the same at the cost and liability of that Society.

13. That each member should, at the first monthly meeting of the Association, pay his or her subscription of 11*s.* upon each share, and should, upon every subsequent monthly meeting, pay the said subscription, together with all fines which might be levied upon

(1) Repealed by Building Societies Act, 1874 (37 & 38 Vict. c. 42) s. 7, except as to subsisting societies until incorporated and as to all societies certified thereunder after 1856 by the Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 25 (2).—A. C.

(2) See note (1), p. 771.

(3) Repealed by 18 & 19 Vict. c. 63, s. 1.

him or her; and that each member neglecting so to do be fined according to the fines for omission set forth in *the 14th rule; and for the seventh and each following month the further sum of 2*s.* per share. That, when the fines to be imposed by those rules should amount to 10*s.* or upwards per share, the member in arrear should pay fines upon such arrear of fines in the proportions set forth by the 14th rule.

14. That every member neglecting or refusing to pay his or her subscription by the day or time appointed should be fined 6*d.* for the first month, 6*d.* for the second month, and so, should the fine be continued, 6*d.* per month for each subscription in arrear for six months, and for the seventh and following months 2*s.* per share. That, if any member should be in arrear in respect of his or her subscription, return of appropriations, or fines, for more than one month, every payment after of such member, if not sufficient to discharge the whole amount thereof, should be applied first to the liquidation of what should be owing for the first month, and then in discharge of the arrear of each succeeding month. The amount of fines for the non-payment should for every share be in the same ratio as such instalments should bear to the monthly subscriptions payable on an original share.

17. That, at least a month before the money at the bankers' should be expected to amount to 200*l.*, an appropriation of that sum should be made in the manner particularly described in the said rule. That every member holding one share of 80*l.* should, on such share being drawn as the share to the holder of which an appropriation was to be made, take up one share and a half more to make up the amount of 200*l.*; and every member holding half a share of 40*l.* should, on its being so drawn, take up three quarters of a share more to make up the amount of 100*l.*, and in the like manner in proportion for quarter shares when drawn; which sums were to be advanced as set forth in the following rules; and that the subscriptions for such two shares and a half should be at the rate of 2*l.* 4*s.* 4*d.* per month for the advance of 200*l.*, and for the advance of 100*l.* it should be 1*l.* 2*s.* 2*d.* per month.

18. That, before any member should be allowed to receive the amount of such appropriation, he or they should deliver or cause to be delivered to the manager a statement in writing containing the nature and situation of the premises intended to be offered for the security thereof, according to a form annexed to the said rules, and such security should be examined and approved of in manner

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in the said rules mentioned (see the second plea); and the said sum of 200*l.* should be advanced out of the Society's money in the hands of the bankers of the Association, provided such member should execute a mortgage of the property purchased by the appropriation, or some other property of sufficient value, to the Society, and deposit the same and all other necessary title deeds relating thereto with the trustees as security for the repayment of the said sum of 200*l.*, with such other sums as by those rules were required to be paid.

[998] 19. That the mortgage deed should be to secure to the Society the payment, by the member receiving the appropriation, of the sum of 20*l.* per year towards the repayment of 200*l.* advanced upon his shares, until the whole sum of 200*l.* should be returned; and, until such sums were paid, the whole of the writings and deeds of the property should be in the custody of the Society; the payments to be made monthly; during the time of paying the 20*l.* per year or any larger sum in proportion, the member should continue to pay his or her subscription of 11*s.* per month the same as though he had not received his appropriation. (See p. 778, *post.*)

36. That the word "trustees" should mean such persons as should be appointed to hold such office for the time being. The word "month" should mean a calendar month.

37. That, when the purposes of that Society should have been completed by each of the shares having obtained its appropriation, the appropriations should terminate: That the whole of the money subscribed for each share should be returned to the shareholders or to their executors or administrators in the following manner. Those members who should have fully repaid the 200*l.* should be at liberty to draw quarterly for the amount of their subscriptions paid into the Society, in the same order as the shares were drawn, except as after mentioned; and, after satisfaction of the shares of the said members, the amount of subscriptions due to each of those members who should not have fully repaid the 200*l.* should be set off from time to time as so much money paid on account of the latter part of the said 200*l.*: thus the member who should obtain his property at the end of twelve years would then be entitled to receive from the Society about 80*l.*, which sum of 80*l.*, being deducted from the 200*l.*, would leave a balance of 120*l.*, which the said member would pay off in four years. The whole of the subscriptions were to be thus returned, with the exception of 3*s.* 6*d.* per annum from each member, which, together with whatever interest should be received from the bankers, and all fines paid in obedience to the rules, should be

appropriated to the paying of the necessary expenses of the Society. If, from any unforeseen loss or damage that might be sustained by the Society, it should appear that that sum is insufficient for the defrayment of the expenses of the Association, it should be lawful for the deficiency to be made up by a proportionate deduction from the returned subscriptions; and that then three fourths in number of the members present at any meeting convened, by giving seven days' notice to each member, should have full power to declare that Association at an end, and all the accounts should be finally closed, and such resolution should be effectual at law and in equity as a release from all the members.

The count then proceeded to allege: That, at the time of the making by defendant of the indenture next mentioned, Joseph Sterry and Joseph Hunt were *the trustees of the Society, and [*999] thereupon, to wit on 29th September, 1849, by indenture of mortgage, between defendant of the one part, and the said J. S. and J. H. (therein described as trustees &c.) of the other part, after reciting that, in accordance with the rules of the said Society, the defendant having become a member of the said Society, the sum of 600*l.* had been duly appropriated to him in respect of his shares in the Society, by way of loan, to be repaid as in the said indenture after mentioned: and further reciting that, the directors of the said Society being prepared to pay defendant the said 600*l.* in respect of the said shares, he had requested them to advance him the same, and defendant had proposed to grant the release therein contained by way of mortgage to the trustees of the said Society pursuant to the rules of the said Society: it was witnessed that, in consideration of the premises mentioned in the indenture, and of the sum of 600*l.* to the defendant paid by the said J. S. and J. H. as such trustees, defendant did thereby grant, bargain, sell, alien and release to J. S. and J. H., their heirs and assigns, all that piece or parcel of land &c. upon certain mortgage trusts therein contained: And defendant did thereby, for himself, his heirs, executors, &c., covenant and agree with J. S. and J. H., their heirs and assigns, and their successors, trustees for the time being of the said Society, that he, defendant, his heirs, executors, &c., would at all times thereafter make the several payments, and perform all the rules of the said Society, in respect of the said shares or otherwise on his or their part to be made and performed: which said indenture was and is a security to the said Society, and was taken in the names of the

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trustees aforesaid for the use and benefit of the said Society, pursuant to the said *rules. That the said Society had continued from the establishment thereof, and during all that time had been entitled, to have, and had had, the benefit of the statutes provided for the establishment and regulation of Benefit Building Societies; and during all that time the said monthly meetings had been duly holden; and the rules had from the making thereof continued in force; and the purposes of the said Society had not been completed by each of the shares having obtained its appropriation, or otherwise howsoever; and the said Society was not at an end; and the said instalments and subscriptions, and fines, still continued payable, pursuant to the said 13th, 14th and 19th rules. And, although the said Society and the trustees thereof for the time being, including the plaintiffs, had always respectively observed and performed, and been ready &c. to observe &c., all matters and things by them respectively to be observed and performed according to the said indenture, and the said advance of 600*l.* was, to wit on &c., duly made, and although defendant, from the making of the said indenture by him hitherto, had been a member of the said Society, nevertheless defendant did not nor would yearly pay 60*l.* towards the repayment of the moneys advanced as aforesaid by monthly payments according to rule 19; but, on the contrary thereof, a large sum of money, to wit 35*l.*, became and was due and in arrear from and by the defendant to the Society for and on account of seven calendar months then last elapsed.

Second breach: that, although defendant, at the making of the said indenture by defendant as aforesaid, and thenceforth during a long period of time, to wit seven months next preceding and ending with and including June, 1851, was the holder of three *shares in the said Society, yet defendant did not nor would pay the subscriptions due by him, pursuant to rule 13, in respect of the three shares; but, on the contrary, &c. (averment that 11*l.* 11*s.* became and was due and in arrear, pursuant to rule 13, for twenty-one subscriptions of 11*s.* 6*d.*, each accruing due in the said seven months in respect of the three shares).

[*1001]

Third breach: that, although defendant on the occasions aforesaid, to wit at the monthly meetings of the said Society, holden in the said seven months respectively, neglected to pay and did not pay his monthly instalments and subscriptions as aforesaid, and thereby in each of those months incurred and became liable to pay fines pursuant to the rules &c.; averment that defendant did not

pay such fines, and the said fines, amounting to 3*l.* 1*s.* 6*d.*, were still due &c.

Plea 1. That one of the said rules so certified &c., and which rules, at the time of the making of the said indenture &c., and defendant's becoming a member &c., were, and continually thence had been, in full force &c., was in the words and figures following, viz.

Arbitration. 33. The directors shall decide upon all disputes that may arise between this Society and any member, or any person complaining on account of any member, respecting the construction of or any omission in these rules, or respecting any other matter relating to this Society and such member or person; and the decision of the directors, if satisfactory to both parties, shall be conclusive; but, if not satisfactory, such dispute shall be referred to arbitrators, pursuant to 10 Geo. IV. c. 56, s. 27; and five arbitrators shall be elected at the first meeting after the enrolment of these rules, &c. (three to be chosen by ballot to decide any matter in difference, &c.).

The plea further stated: That each and every of the claims and causes of action in the declaration mentioned were, before and at the commencement of this suit, matters in dispute arisen between the Society in *the said rule mentioned and the defendant as a [*1002] member thereof, respecting certain matters relating to the said Society and the defendant as such member thereof, within the meaning of the said rule: that is to say, the defendant, as such member, before and at the commencement of this suit, disputed his liability to pay the several amounts, the non-payment whereof was relied upon in the respective breaches laid in the declaration, to the said Society, or to the plaintiffs as trustees thereof, and the right of the said Society and the trustees thereof, or either of them, under the said rules, to bring or maintain any action in respect thereof against the defendant as such member: That arbitrators were duly appointed according to the said rule, and continued to be arbitrators thenceforth until and at the commencement of this suit: And that the defendant had never at any time had notice of or assented to any decision of the said directors upon the said matters in dispute, and had always, from the time when the said dispute so arose and the alleged cause of action accrued, as in the declaration mentioned, hitherto, been ready and willing, as the said directors and the plaintiffs well knew, "and hereby offers," to refer the said

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matter in dispute, being the said causes of action and claims in the declaration mentioned, to the said arbitrators or any three of them, according &c. (to the said rule and to the statute). Verification.

Plea 2. That another of the said rules, to wit, the 18th, provided:

That, before any member of the said Association shall be allowed to receive the amount of the appropriation in the said rules mentioned, he shall deliver or cause to be delivered to the manager of the said Association a statement in writing containing the nature and situation of the premises intended to be offered for the security

[*1003] thereof, according to a *certain form annexed to the said rules; and the said manager shall forthwith transmit the said statement to the surveyor of the said Association, who shall survey such premises and make his written report thereof to the directors of the said Association within one week after the receipt of the said statement; and, if the said directors be satisfied that the premises so offered are a sufficient security to the said Association, they shall then instruct the solicitor of the said Association to examine the title deeds, and he shall make his written report on the title within one week after the receipt of his instructions; and, if the said directors be satisfied with the title, the conveyance of the said premises to the member receiving the said appropriation, and all other necessary documents, shall be forthwith prepared by the said solicitor, and a certain sum, to wit 200*l.*, shall be advanced out of the money of and belonging to the said Association in the hands of the bankers of the Association, provided such member execute a mortgage of the property purchased by the appropriation, or some other property of sufficient value, to the said Association, and deposit the same, and all other necessary title deeds relating thereto, with the trustees of the said Association, as security to the said Association for the repayment of the sum advanced, together with all other sums by the said rules so certified, allowed, entered and in force as aforesaid required to be paid.

The plea then stated that by, to wit, the 19th of the said rules it was ordered &c. as follows, viz.

That, if any member having executed a mortgage shall at any time thereafter fail, neglect or refuse for six monthly nights to pay, observe and perform all or any of his or her subscriptions, payments and regulations on his or her part respectively to be paid, observed and performed, then the directors for the time being shall

appoint a person or persons to collect the rents and profits of the premises therein mentioned; but, should the same be insufficient to satisfy the purpose aforesaid, or should the member refuse to allow the person or persons so appointed to collect the said rents and profits, or neglect or refuse to supply such person or persons with sufficient authority to collect the same, or, if required by the directors under the hands of the trustees, to collect the same himself or herself and to pay the same forthwith to such person or persons, then the said directors shall, without the concurrence or consent of the said member, absolutely sell and dispose of all or any part of the said premises by public auction or by private contract, and shall be at liberty to rescind any contract or contracts for the sale thereof, and to resell the same premises by either of the means aforesaid; and shall receive the purchase money arising therefrom. And at any public sale any person appointed by the directors in writing shall be allowed to buy in the premises on behalf of the Association; and the directors may resell the same without being answerable for any loss occasioned by such resale; and, out of the money arising from such collection *of rents and profits of such [*1004] sale as aforesaid, the trustees for the time being shall, in the first place, discharge &c. (costs of collection, sale &c.); and in the next place shall retain to reimburse themselves and the said Association all such principal subscriptions and other payments as shall be then due, owing and payable by such member under and by virtue of these rules or the deed, in trust to sell, mortgage or other assurance or both; and the moneys so retained for the said Association shall be immediately placed with the Association's bankers, to the account of the trustees, for the use and benefit of the Association &c.; (surplus, if any, to be paid to such member or his appointee).

The plea then alleged: That the claims and causes of action in the declaration mentioned, at the commencement of this suit, arose and were in respect of certain principal subscriptions and other payments which then were, and had been for more than six calendar months after the execution of the indenture &c., and before the commencement of this suit, due, owing and payable by the defendant as a member of the said Association, under and by virtue of the said rules and indenture of mortgage. That defendant, after the execution &c., failed and neglected for six monthly nights to and did not pay, observe or perform all or any of his subscriptions,

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matter in dispute, being the said causes of action and claims in the declaration mentioned, to the said arbitrators or any three of them, according &c. (to the said rule and to the statute). Verification.

Plea 2. That another of the said rules, to wit, the 18th, provided:

That, before any member of the said Association shall be allowed to receive the amount of the appropriation in the said rules mentioned, he shall deliver or cause to be delivered to the manager of the said Association a statement in writing containing the nature and situation of the premises intended to be offered for the security thereof, according to a *certain form annexed to the said rules; and the said manager shall forthwith transmit the said statement to the surveyor of the said Association, who shall survey such premises and make his written report thereof to the directors of the said Association within one week after the receipt of the said statement; and, if the said directors be satisfied that the premises so offered are a sufficient security to the said Association, they shall then instruct the solicitor of the said Association to examine the title deeds, and he shall make his written report on the title within one week after the receipt of his instructions; and, if the said directors be satisfied with the title, the conveyance of the said premises to the member receiving the said appropriation, and all other necessary documents, shall be forthwith prepared by the said solicitor, and a certain sum, to wit 200*l.*, shall be advanced out of the money of and belonging to the said Association in the hands of the bankers of the Association, provided such member execute a mortgage of the property purchased by the appropriation, or some other property of sufficient value, to the said Association, and deposit the same, and all other necessary title deeds relating thereto, with the trustees of the said Association, as security to the said Association for the repayment of the sum advanced, together with all other sums by the said rules so certified, allowed, entered and in force as aforesaid required to be paid.

[*1003]

The plea then stated that by, to wit, the 19th of the said rules it was ordered &c. as follows, viz.

That, if any member having executed a mortgage shall at any time thereafter fail, neglect or refuse for six monthly nights to pay, observe and perform all or any of his or her subscriptions, payments and regulations on his or her part respectively to be paid, observed and performed, then the directors for the time being shall

appoint a person or persons to collect the rents and profits of the premises therein mentioned; but, should the same be insufficient to satisfy the purpose aforesaid, or should the member refuse to allow the person or persons so appointed to collect the said rents and profits, or neglect or refuse to supply such person or persons with sufficient authority to collect the same, or, if required by the directors under the hands of the trustees, to collect the same himself or herself and to pay the same forthwith to such person or persons, then the said directors shall, without the concurrence or consent of the said member, absolutely sell and dispose of all or any part of the said premises by public auction or by private contract, and shall be at liberty to rescind any contract or contracts for the sale thereof, and to resell the same premises by either of the means aforesaid; and shall receive the purchase money arising therefrom. And at any public sale any person appointed by the directors in writing shall be allowed to buy in the premises on behalf of the Association; and the directors may resell the same without being answerable for any loss occasioned by such resale; and, out of the money arising from such collection *of rents and profits of such [*1004] sale as aforesaid, the trustees for the time being shall, in the first place, discharge &c. (costs of collection, sale &c.); and in the next place shall retain to reimburse themselves and the said Association all such principal subscriptions and other payments as shall be then due, owing and payable by such member under and by virtue of these rules or the deed, in trust to sell, mortgage or other assurance or both; and the moneys so retained for the said Association shall be immediately placed with the Association's bankers, to the account of the trustees, for the use and benefit of the Association &c.; (surplus, if any, to be paid to such member or his appointee).

The plea then alleged: That the claims and causes of action in the declaration mentioned, at the commencement of this suit, arose and were in respect of certain principal subscriptions and other payments which then were, and had been for more than six calendar months after the execution of the indenture &c., and before the commencement of this suit, due, owing and payable by the defendant as a member of the said Association, under and by virtue of the said rules and indenture of mortgage. That defendant, after the execution &c., failed and neglected for six monthly nights to and did not pay, observe or perform all or any of his subscriptions,

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payments and regulations on his part to be paid &c., of all which &c. (notice to the directors and the plaintiffs): That the premises in the declaration mentioned, so by the defendant granted, bargained &c., were at the time of the execution &c., and still continued, a sufficient security to the said Association for the repayment of all the moneys so advanced to the defendant as a member &c., and of all the other sums by the said rules required to be paid; and that, if the directors had, upon such failure and neglect by defendant as herein aforesaid, appointed some person or persons to collect the rents and profits of the last mentioned premises, the money that would have arisen from such collection

[*1005] would have *been sufficient to discharge all costs, charges and expenses which would or could have been incurred by such collection, and to reimburse the plaintiffs as such trustees as aforesaid, and the said Association, all principal subscription and other payments which at the time of the commencement of this suit were due &c. by the defendant as such member under and by virtue of the said rules and the said indenture &c., viz. all the claims and causes of action in the declaration mentioned. That the defendant had always, from the time of the aforesaid failure and neglect by him up to the commencement of this suit, been, and still was, ready and willing to suffer and permit any person or persons appointed by the directors for such purpose to collect the said rents and profits, and to supply such person or persons with sufficient authority to collect the same, and, upon being required by the directors so to do, to collect the said rents and profits himself, and pay the same forthwith to the said person or persons; but that the said directors had not, nor had the trustees, at any time appointed any person or persons to collect the said rents and profits, nor required defendant to collect them himself and pay the same to such person or persons, as they might and ought to have done according &c. (to the statute and the rules). Verification.

Replication to plea 1. That the said rules in the said first plea mentioned (including the rule set forth in the said plea and called the 33rd rule) were duly certified and allowed and enrolled pursuant to the statutes &c., long before defendant became a member of the said Society; that the first meeting of the said Society next after the said rules were so certified &c. (being the said first meet-

[*1006] ing mentioned in the 33rd rule) was duly held *pursuant to the said rules on 11th February, 1847, and long before defendant became a member &c.; that, by accident, mistake and oversight

on the part of the said Society and the then officers and members thereof respectively, no such arbitrators as in the said 33rd rule mentioned, nor any arbitrators whatever, were elected or appointed at the said first meeting or at any adjournment thereof, and no arbitrators had ever been elected or appointed pursuant to the 33rd rule: That, at the respective times when the defendant became a member of the said Society and when the said indenture was made &c., and when the causes of action in the declaration mentioned respectively accrued, and at the time of the commencement of this suit, there were no arbitrators appointed pursuant to the 33rd rule to whom any such matters as in that rule mentioned could be referred pursuant to the said rule: Without this, that arbitrators were duly appointed according to the said rule, in manner and form &c. Conclusion to the country.

General demurrer to plea 2. (The ground stated in the margin was, that the Society by their trustees might sue on the express covenant of the defendant, and were not bound to pursue the course suggested in this plea: that they might adopt either course at their option.) Joinder.

Demurrer to the replication to plea 1, stating, as grounds, that the special traverse was taken upon a matter immaterial to the merits of the first plea, or was at all events premature: that it was to be presumed that arbitrators were appointed in compliance with stat. 10 Geo. IV. c. 56, s. 27, and rule 33: that the replication should have concluded with a verification: that the Society were not now at liberty to set up their own *laches* in the *non-appointment of arbitrators, and non-compliance with the statute under which the plaintiffs' right to sue arose: more especially as it appeared that defendant was not a member at the time of the first meeting, nor was he shown to have been cognizant of the alleged oversight: that the replication should have shown affirmatively the due appointment of arbitrators and refusal by defendant to refer, as the defendant, by the covenant sued upon, was bound to perform all the rules of the Society, and consequently to refer the causes of action, which the defendant had averred his readiness to do, &c. Joinder.

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W. R. Cole, for the plaintiffs (1):

First, the first plea is bad. The summary remedy provided by

(1) The demurrers were argued in this Term, January 16th, before Lord Campbell, Ch. J., Patteson and Wightman, JJ.; and 20th, before Lord Campbell, Ch. J., Patteson and Coleridge, JJ.

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the Act is cumulative, not exclusive, and therefore does not prevent the Society from bringing an action of covenant, by their trustees, upon the mortgage deed. Stat. 6 & 7 Will. IV. c. 32, incorporates, by sect. 4, all the applicable provisions of stat. 10 Geo. IV. c. 56. The latter statute, by sects. 27, 28, provides a summary remedy for the decision of disputes, either by arbitrators or by justices of the peace; but there is nothing to show that it excludes the remedy of an action at common law. Such exclusion would have produced great inconvenience; for cases of dispute might frequently occur in which one of the parties resided in a different county from that in which the Society was established, so that the serving of the summons to attend before a justice might be attended with much difficulty; or where one of the parties had no goods upon which a [*1008] distress could be levied. The *sheriff has now the power, under stat. 1 & 2 Vict. c. 110, s. 12, to seize money and securities. But, independently of the impolicy of excluding the remedy at common law, such exclusion could be made only by express words, and therefore does not exist here.

(LORD CAMPBELL, Ch. J.: Could not an action be brought upon the award of the arbitrators?)

Their award can apparently be enforced only by an order of two justices, under sect. 27 of stat. 10 Geo. IV. c. 56. The general rule of law is, that, where a statute provides a remedy in respect of a right which existed before and is not created by the statute contemporaneously with the remedy, such remedy is cumulative: *Cates* v. *Knight* (1), *Mayor of Lichfield* v. *Simpson* (2), *Reg.* v. *Buchanan* (3), *Sharp* v. *Warren* (4).

(WIGHTMAN, J.: Has the Society the option, in all cases, of proceeding in the superior Courts?)

It has, upon the principle which was acted upon in *Albon* v. *Pyke* (5). *Cutbill* v. *Kingdom* (6) is a decision to the same effect under the particular statutes now in question. In *Morrison* v. *Glover* (7) and *Doe* d. *Morrison* v. *Glover* (8) it was held that where a dispute arose between a Society established under this Act and one of its members,

(1) 3 T. R. 442. See *The Dundalk Western Railway Company* v. *Tapster*, 1 Q. B. 667.
(2) 70 R. R. 417 (8 Q. B. 65).
(3) 8 Q. B. 883.
(4) 6 Price, 131.
(5) 4 Man. & G. 421.
(6) 74 R. R. 738 (1 Ex. 494).
(7) 80 R. R. 645 (4 Ex. 430).
(8) 15 Q. B. 103.

upon a transaction in which such member had acted not merely as a member, but in the separate character of a mortgagor, the Society was not bound to refer the dispute to arbitration, but might resort to an action. *Crisp* v. *Bunbury* (1) is, no doubt, an authority against a summary remedy provided by statute being cumulative: *but that was a decision upon a different Act, 9 Geo. IV. c. 92, s. 45. [*1009]
Rex v. *Mildenhall Savings Bank* (2) was decided upon the authority of *Crisp* v. *Bunbury* (1), but, as it seems, with some hesitation. Sect. 8, however, of stat. 9 Geo. IV. c. 92, would certainly seem to give the trustees under that Act the power of suing at common law.

(LORD CAMPBELL, Ch. J.: It might have been intended, by that section, to give such power only as against strangers.)

Timms v. *Williams* (3) will probably be relied on. But in that case, which turned upon the Loan Societies' Act, 5 & 6 Will. IV. c. 23, the COURT decided only that the treasurer could not sue at common law upon a promissory note made payable to the Society: whether or not the trustees could have sued was questioned; but no decision was given on the point. *Ex parte Payne* (4) may also be cited. But there the dispute was merely as to the construction of the Society's rules, and not upon a mortgage deed, as in the present case: and the plaintiff was a member of the Society: the converse case of a proceeding by the Society against a member does not seem to have been discussed; and *Sharp* v. *Warren* (5) and *Albon* v. *Pyke* (6) were not referred to. *Crisp* v. *Bunbury* (1) was cited; but not much notice seems to have been taken of the fact that that case turned upon a different statute. The 6th rule of the Society here, which is set out in the declaration, and which provides for giving indemnity to the trustees in any action or suit which they may commence or defend, shows that the Society considered that the trustees had power to sue at common law. And neither stat. 6 & 7 Will. IV. *c. 32, nor stat. 10 Geo. IV. c. 56, expressly excludes such [*1010]
power. Where that is intended, it is done by express words, as, in the case of Friendly Societies, by stat. 9 & 10 Vict. c. 27, s. 15. Moreover, by rule 23, the jurisdiction of the arbitrators is not created until a reference to the directors has been made, and has not proved satisfactory. The plea does not state any facts relating to such a reference and its event, and therefore shows nothing to

(1) 34 R. R. 747 (8 Bing. 394).
(2) 6 Ad. & El. 952.
(3) 3 Q. B. 413.
(4) 79 R. R. 892 (5 Dowl. & L. 679).
(5) 6 Price, 131.
(6) 4 Man. & G. 421.

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give the arbitrators jurisdiction, or to oust the jurisdiction of the superior courts of law.

Secondly, the replication is a sufficient answer to the plea. When the defendant became a member, he must be taken to have done so with full knowledge of the rules of the Society. Stat. 10 Geo. IV. c. 56, s. 27, which is not merely directory upon this point, enacts that the arbitrators shall be chosen at the first general meeting after the enrolment of the rules: this step not having been taken, arbitrators could not be appointed at all until a fresh rule was made, which could be done only, as provided in sect. 9, by the consent of three fourths of the members present at a general meeting: and it is not alleged that this was done.

(LORD CAMPBELL, Ch. J.: As to the alteration of the rules, we must presume that what can be done to carry out the intention of the Act has been done.)

Thirdly, the second plea is bad. The power given, by rule 19, to the directors to collect the rents, and, if they are not sufficient, to sell the mortgaged property, does not exclude their right to sue upon the express covenant to pay the instalments. In order to exclude such right, the words "shall appoint" and "shall" "sell," [*1011] in the rule, would have to be construed *as "must appoint" and "must sell," and so generally throughout the rule: but "shall" there ought clearly to be construed as "may." Moreover, if the word "shall" converts the power given to the directors to collect the rents or sell the property into a covenant to do so, the remedy of the defendants is a cross action upon such covenant. Further, the action here is brought for the non-payment of several instalments which became due within six calendar months after the execution of the mortgage. There was a separate default in the non-payment of each. The plea, therefore, though it might have been good if pleaded in respect of the non-payment of the first instalment only, is bad, inasmuch as it is pleaded in respect of the non-payment of all.

Fortescue, contrà:

The action is not maintainable. The plaintiffs, as assignees of a chose in action, have no right to sue at common law. The statute, however, gives them a remedial form of proceeding; and to that form they are necessarily restricted. In the character of plaintiffs,

they exist only as creatures of the statute; and therefore they cannot take advantage of their own wrong, and claim to have acquired a remedy at common law by having neglected to follow the statute. The first plea, therefore, is good, and the replication is no answer. The language of sect. 27 of stat. 10 Geo. IV. c. 56, which provides for the appointment of arbitrators, is clearly imperative, and enacts that their decision "shall be final, to all intents and purposes," the only alternative in the shape of a remedial proceeding being a reference to two justices, under sect. 28. *Ex parte* **Payne* (1) is a direct authority that the statutory remedy is exclusive and not cumulative. *Cutbill* v. *Kingdom* (2) is not in point. In that case the matter in dispute was not included among those mentioned in the rule which provided for reference to arbitrators. *Crisp* v. *Bunbury* (3) is also strongly in favour of the defendant. In *Morrison* v. *Glover* (4) the decision rested on the ground that part of the subject-matter of the action was matter which was not in dispute between the Society and the defendant as a member. *Doe* d. *Morrison* v. *Glover* (5) was also decided on the ground that the dispute involved questions in which a person, for this purpose a stranger, was concerned. [*1012]

(LORD CAMPBELL, Ch. J.: How could arbitrators be now appointed, in the present case?)

The Act is merely directory: probably this Court would grant a *mandamus* to appoint them. It may be true, as has been contended, that the defendant, on becoming a member, must be supposed to have been cognizant of all the rules; but he cannot be held to have been cognizant of all the facts, or of the particular fact that no arbitrators had been appointed.

(LORD CAMPBELL, Ch. J.: In strictness, the rule of the Society as to arbitration does not conform to sect. 27 of stat. 10 Geo. IV. c. 56; for the rule provides for a reference, in the first instance, to the directors.)

The statute is practically complied with.

(LORD CAMPBELL, Ch. J.: What course do you contend that the Society should have taken here?)

(1) 79 R. R. 892 (5 Dowl. & L. 679).
(2) 74 R. R. 738 (1 Ex. 494).
(3) 84 R. R. 747 (8 Bing. 394).
(4) 80 R. R. 645 (4 Ex. 430).
(5) 15 Q. B. 103.

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They might have exercised their power of sale, under the rule set out in the second plea.

[*1013] (PATTESON, J.: The first plea makes *the express allegation that arbitrators were appointed).

The allegation is not material. Even assuming that, by the omission of the Society to appoint arbitrators, they are remitted to their rights at common law, the action should have been by the original covenantees.

(LORD CAMPBELL, Ch. J.: The covenant was with them as trustees.)

That might have been merely matter of description.

W. R. Cole, in reply:

There can be no doubt that the new trustees can sue, if the original trustees could. Sect. 21 of stat. 10 Geo. IV. c. 56, vests all property, obligatory instruments, rights and claims of the Society in the treasurer or trustee "for the time being," and, after his death or removal, in "the succeeding treasurer or trustee," "subject to the same trusts;" and such treasurer or trustee is authorized to "bring or defend" "any action, suit, or prosecution," "in law or in equity," "concerning the property, right, or claim" of the Society.

(PATTESON, J.: Does that section enable the trustees to sue upon a covenant, as in the present case?

COLERIDGE, J.: Is not sect. 27 a proviso, as it were, to sect. 21?)

The two sections are quite consistent, according to the construction contended for by the plaintiffs. The former directs the mode in which the common law remedy is to be pursued; the latter adds, cumulatively, a statutory remedy.

(LORD CAMPBELL, Ch. J.: That construction is contrary to the doctrine of TINDAL, Ch. J., in *Crisp* v. *Bunbury* (1).

COLERIDGE, J.: Sect. 21 may be very fairly held to apply only to
[*1014] proceedings against strangers. *Could the trustees bring an action for the mere non-payment of the monthly instalments?)

(1) 34 R. R. 747 (8 Bing. 394).

That is an extreme case; but there is nothing in the Act or the rules to prevent them. *Ex parte Payne* (1) was decided mainly on the authority of *Crisp* v. *Bunbury* (2); and the latter case has been much shaken.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., in this Term (January 29th), delivered the judgment of the COURT:

In this case we are of opinion that, upon the demurrer to the replication to the first plea, there ought to be judgment for the plaintiffs.

The declaration seems to us to be sufficient, as it shows a right of action in the plaintiffs as trustees of the Second Borough of Southwark Benefit Building and Investment Association, under stats. 6 & 7 Will. IV. c. 32, s. 4, and 10 Geo. IV. c. 56, s. 21.

We are inclined to think that the first plea is good, as, after setting out rule 33 of the Society, for arbitration, it avers that all the claims and causes of action in the declaration mentioned were matters in dispute between the Society and the defendant as a member thereof; that arbitrators were duly appointed according to the said rule, and continued to be arbitrators thenceforth until the commencement of this suit; and that the defendant has always been and still is ready and willing to refer the said matters in difference to the said arbitrators according to the rule and the statute in that behalf, which the directors well knew. A mere covenant *between the parties to refer to arbitration will not oust [*1015] the courts of law of their jurisdiction: but the question here is whether, arbitrators being duly appointed, the Legislature has not enacted that all matters in difference between the Society and the members shall be referred to the said arbitrators and finally adjudicated upon by them, to the exclusion of any action in a court of law. In *Ex parte Payne* (1) ERLE, J., sitting in the Bail Court, after full argument and great deliberation, put this construction on the 27th section of stat. 10 Geo. IV. c. 56, considering it to be the expressed intention of the Legislature to protect such Societies, and their members, who are generally persons in an inferior rank of life with small means, from the vexation and ruin which might be brought upon them by litigation in courts of law, and to provide for them a domestic tribunal by which all their differences might be speedily decided and at a very small expense. The same

(1) 79 R. R. 892 (5 Dowl. & L. 679). (2) 34 R. R. 747 (8 Bing. 394).

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construction was put upon a similar statute by the Court of Common Pleas in *Crisp* v. *Bunbury* (1), in which TINDAL, Ch. J. impressively points out the oppressive consequences which would follow to such Societies and their members if this power of referring to arbitration were held to be cumulative only. The case of *Morrison* v. *Glover* (2), holding that an action might be maintained by the treasurer of a Building Society, proceeded on the ground that there a part of the plaintiff's claim was not a matter in dispute between the Society and the defendant as a member; and in *Doe* d. *Morrison* v. *Glover* (3)
[*1016] this Court merely held that an ejectment for *the benefit of a Building Society might be maintained in the name of John Doe on the demise of the person in whom the legal estate was vested. The other authorities relied upon to show that in all cases the Society has an option either to refer or to bring an action do not outweigh *Ex parte Payne* (4) and *Crisp* v. *Bunbury* (1); and, upon an attentive consideration of the words of the Act of Parliament, they appear to us to be not merely permissive, but to enact that, where there may, there must, be a reference to the arbitrators.

Supposing the first plea to be sufficient, we are of opinion that it is sufficiently answered by the replication, which traverses the allegation that arbitrators were appointed according to the rule of the Society and the Act of Parliament, and, in pointing the traverse, shows that arbitrators never have been appointed by the Society, and that, when those matters in difference arose for which the action is brought, a reference to arbitrators was impossible.

The defendant's counsel contends that it is not competent to the Society to take advantage of their own wrong, and that they cannot be allowed to aver that arbitrators were not appointed. We are not called upon to decide what the effect would have been if the defendant, in his plea, instead of alleging that arbitrators had been appointed, had merely alleged that he was ready and willing to refer the matters in difference to arbitrators according to the rule and the statute, and that he had requested the directors to do what was necessary for that purpose. But we entertain no doubt that,
[*1017] when he has alleged that arbitrators were appointed *to whom the matters in difference ought to have been referred, a traverse of that allegation, which he has made material, is a good answer to the plea.

We are likewise of opinion that there must be judgment for the plaintiffs on the demurrer to the second plea founded on the 18th

(1) 34 R. R. 747 (8 Bing. 394).
(2) 80 R. R. 645 (4 Ex. 430).
(3) 15 Q. B. 103.
(4) 79 R. R. 892 (5 Dowl. & L. 679).

and 19th rules of the Society, although the directors might have a remedy by appointing a receiver to collect the rents, or by exercising the power of sale. If an action may be maintained at all, it appears clear to us that an action, notwithstanding such remedy, may be maintained for breach of the express covenant to repay the mortgage money.

Therefore our judgment will be for the plaintiffs on the whole record.

Judgment for the plaintiffs.

CHANCERY.

1849. *Feb.* 15.

SHADWELL, V.-C.

[144]

BODINGTON *v.* THE GREAT WESTERN RAILWAY COMPANY.

(13 Jurist, 144—145.)

A Railway Company, which had statutory power to purchase land and complete the line at any time within seven years, served notice to treat under the Act, and subsequently, in pursuance of their notice, contracted to purchase lands, agreeing to pay interest on the purchase-money from the day they should commence their works on the lands till the purchase-money should be paid. The Company did not enter into possession, or commence works, for two years: suit for immediate specific performance dismissed.

ON the 16th February, 1846, the Oxford and Rugby Railway Company gave notice in writing to the plaintiff, John Bodington, that certain lands in the parish of Southam, in the county of Warwick, the fee simple in which lands was vested in the plaintiff, were required by them for the purposes of their railway. Under the provisions of the Oxford and Rugby Railway Act, 1845, and of a subsequent Act of the 9 Vict., for amending and enlarging some of the provisions of the Acts relating to the Great Western Railway Company, and for confirming the purchase of certain railways by the said Company, the Oxford and Rugby Railway became vested in the Great Western Company, and part of the Great Western line; and thereupon the Oxford and Rugby Company ceased to exist. Previously to the vesting of their line in the Great Western Company, the Oxford and Rugby Company had employed Richard Hall, as their agent, to treat with plaintiff for the purchase of the lands required; and subsequently Hall was employed by the Great Western Company, as their agent, to conclude the purchase. The Company and Hall gave the usual notices under their Acts to the plaintiff, and ultimately, on the 20th June, 1846, Hall, on behalf of the Great Western Company, but in the name of the Oxford and Rugby Company, which had in fact then ceased to exist, and William Savage Poole, of the firm of Poole & Sons, solicitors, who were employed by plaintiff as his agents in the transaction, entered into an agreement in writing, which was ratified by plaintiff, and, so far as is material, was as follows: "The Oxford and Rugby Railway Company. Memorandum of an agreement made this 20th June, 1846, between Richard Hall, of Cirencester, an able practical surveyor, nominated for and on behalf of the above Company, who agrees to give and pay the sum of 1,450*l.* for the purchase of the freehold and inheritance in fee simple of and in all

those parcels of land &c., containing 8a. 1r. 24p., situate &c.; the said sum of 1,450*l.* to include all satisfaction or compensation for any damage, loss, or inconvenience occasioned by severance or otherwise to the remainder of the estate, and in full satisfaction of all culverts, bridges, drains, ways, passages, and watering-places, either over or under the railway of the said Company, or intercepted thereby, except a bridge over the railway in the field No. 4, and a level crossing in the field No. 2; and William Savage Poole, of Kenilworth, in the said county, gent., agent for John Bodington, of the Castle, in Kenilworth aforesaid, owner of the fee of the above premises, who agreed to accept the said sum of 1,450*l.* on the terms above mentioned. The land-tax on the above property is to be borne and charged on the remaining land of the vendor. The land is tithe-free. Of the above consideration, 840*l.* is declared for the land, 610*l.* for severance and other damage. In case additional land shall be required for the Company, for the purpose of constructing the railway, as distinguished from buildings and stations, the same to be taken and paid for after the rate per acre as is above stated. And it is hereby further agreed, that the said Company shall pay interest on the said sum of 1,450*l.*, at the rate of 4*l.* per cent. per annum, from the day they shall commence their works in any of the said closes until the said purchase-money shall be paid." Shortly after the date of this agreement, Messrs. Poole & Sons, at the request of Mr. Stevens, the solicitor of the Great Western Railway Company, furnished him with an abstract of plaintiff's title. On the 21st August, 1846, Mr. Stevens sent a draft conveyance of the lands in question to Messrs. Poole & Sons, for their approval; and on the 25th August the latter returned the draft, approved by them on plaintiff's behalf. The Company had never entered into possession of the land; neither had they, notwithstanding applications from time to time, made to them on behalf of the plaintiff, urging them to complete the purchase, taken any further steps towards its completion. There had been much correspondence between the two parties; and a question was raised as to whether the solicitors of the Company had not agreed, on the part of the Company, to pay interest on the purchase-money from 1st January, 1847. Under these circumstances, the plaintiff, on the 2nd May, 1848, filed the bill in this cause against the defendants, the Great Western Railway Company, praying that the defendants might be decreed specifically to perform the above-mentioned agreement, and to pay the plaintiff the said sum of 1,450*l.*

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together with interest for the same, from the 1st January, 1847, until such purchase-money should be paid. The cause came on for hearing on bill and answer.

Fooks (*James Parker* with him), for the bill, contended, that, from the delay which had occurred, an immediate decree for specific performance, without any reference as to title, should now be made.

T. Stevens (*Bethell* and *Rolt* with him), for the defendants:

The only question is as to the construction of the contract; and, upon that, plaintiff's application to the Court is premature, the time for completion of the purchase not having arrived. Plaintiff knew that the land was required for the railway; and, by the Oxford and Rugby Act, (8 & 9 Vict. c. clxxxviii.), sect. 31, the period of seven years was limited, within which the line was to be completed, but that has not yet expired. Plaintiff must be taken to have been aware of the provisions of the statute, as the notices were given and Hall was appointed under the statute, and this makes the case different from that of a contract between individuals. The Company, under the agreement, have power to take additional lands from time to time, if necessary; and, up to the present time, it is doubtful what lands may be the subject of this agreement. The Company are not to be required to take different conveyances from time to time of the various pieces of land they may require; but the additional lands, if any, are to form, with the original land, the subject of one conveyance. The stipulation in the contract as to interest removes all doubt. *Primâ facie* interest runs only from the time when the principal becomes due; and here the time for payment of the principal has not yet arrived.

Fooks, in reply:

It is said that the purchase-money is not payable. Had the Company entered into possession and completed the works, would it not be payable? As to the seven years mentioned in the Act, are we to wait for seven years in order to know what the purchaser intends to do? This is the ordinary case of vendor and purchaser, with no time mentioned for the performance of the contract; and the stipulation, that when they enter into possession they shall pay
[*145] *interest, is but the ordinary stipulation. This is the only stipulation. The only time mentioned is that from which interest is to be

paid. We say the purchasers ought to have gone on with diligence and completed their purchase, and they have given no reason why they should not. They say they might have taken other lands; the answer to that is, that they have taken our lands, at all events.

THE VICE-CHANCELLOR:

I understand you to ask for a decree immediately. Then the real question is, whether, upon a fair construction of this agreement, the purchase-money is to be paid immediately; that cannot be the construction of the agreement. First of all, the agreement sets forth the sum agreed upon; then it states, that, in case additional land should be required by the Company, it should be taken and paid for after the rate per acre as was above stated. That applies to something future, which has not yet arisen. "And it is further agreed, that the said Company shall pay interest on the said sum at the rate of 4*l.* per cent. from the day they shall commence their works until payment." It appears to me, there is a time fixed for the time at which interest shall commence, but there is no time fixed for payment of the principal. I should conceive, therefore, that payment of the principal, supposing the Company entered, would have to be made either when the works were completed, or at the time when the works could not be completed at all. Here it is said, that interest shall commence from the day they shall commence the works until the purchase-money shall be paid. I understand they have not yet begun; my notion, therefore, is, if no interest at present is payable, that some hereafter will be payable, for a period which will be determined by some future act—according to my construction of the agreement—for the period which may elapse between the time when interest and the time when principal must be payable. It appears to me, the bill must be dismissed, with costs.

SNARE *v.* BAKER.
BEASLEY *v.* SNARE.

1849. *Jan.* 13.

SHADWELL, V.-C.

(13 Jurist, 203.)

[203]

A mortgagee in trust had been guilty of breaches of trust, in respect of which a suit by his cestuis que trust (infants) was pending against him. He was restrained, on the petition of the cestuis que trust, from receiving the mortgage-money under a decree which had been made in a prior foreclosure suit, and the solicitor of the cestuis que trust, the plaintiffs in the

SNARE v. BAKER. BEASLEY v. SNARE.

subsequent suit, was appointed in his stead to receive the same, without giving the usual security: The COURT refused to appoint a nominee of the cestuis que trust mentioned in the petition, without security, he not being an officer of the Court.

THE first of these suits was for foreclosure, and in it the common decree had been made, referring it to the Master to compute the principal and interest due on the mortgage, and to appoint a time and place for payment in the usual course. Snare, the plaintiff in that suit, sued as trustee for the plaintiffs in the second suit (*Beasley* v. *Snare*), who were infants. The bill in *Beasley* v. *Snare* sought relief against Snare in respect of breaches of trust, which were in fact admitted in his answer. A petition in both causes was now presented by the plaintiffs in *Beasley* v. *Snare*, stating the above-mentioned facts, and praying that Snare might be restrained from receiving the amount of principal, interest, and costs which had been ordered to be paid to him, as the plaintiff in *Snare* v. *Baker*; and that the amount of such principal, interest, and costs might be ordered to be paid to Mr. J. B. Clacy, (whom the petitioners were desirous of having appointed by the Court for that purpose), without his giving the usual security, and that he might be at liberty to attend at the Rolls Chapel for the purpose of receiving the same; and that Snare might be ordered, upon such payment being made to Clacy, to re-convey the mortgaged hereditaments.

Bethell and *W. Morris*, for the petition.

Rolt and *Shapter*, for Snare, *contrà*, contended that there was no ground for the application, there being no evidence that the money would be lost if received by Snare. The Court could not appoint Clacy, who was not one of its own officers, without the usual security. They also objected that the application ought to have been by motion.

The VICE-CHANCELLOR said the petition was right, and that he should make the order. But he could not appoint Clacy. He thought the proper person to appoint would be the plaintiffs' solicitor, who, as an officer of the Court, might be so appointed without the usual security, he undertaking to pay the money into Court when received.

Order made accordingly.

CRIDLAND *v.* LORD DE MAULEY.

1849. *Jan.* 18.

(13 Jurist, 442—443.)

KNIGHT BRUCE, V.-C. [442]

The Court will not order the production of documents by defendants, which are in the possession of their solicitors, as solicitors for them, and for other persons not before the Court.

THIS was a motion made on behalf of the plaintiffs, allottees of shares in the Bridgewater and Minehead Railway Company, for the production of documents admitted by the defendants, directors of the Company, to be in the possession of their solicitor, as solicitor for the Company.

Forster, in support of the motion, cited *Walburn* v. *Ingilby* (1). * * *

Terrell, for some of the defendants, opposed the motion, on the ground that the bill had been dismissed *by the plaintiffs themselves, as against two of the directors of the Company who had originally been made defendants, and, therefore, that the documents were in the possession of persons who were solicitors for parties not before the Court, as well as for those who were still defendants on the record. In such a state of circumstances, the Court would not entertain the motion: *Murray* v. *Walter* (2). * * * [*443]

Hitchcock, for another defendant (Bailey), who admitted documents to be in his custody, but not in the same situation as the other documents.

KNIGHT BRUCE, V.-C.:

So far from making the plaintiffs pay the costs of the motion, I wish I were in a situation, not only to order the defendants to produce the documents, but also to pay the costs. As, however, the law stands on the subject of discovery and production of documents, I can make no order upon the motion, except that the defendant Bailey shall produce those documents admitted to be in his own custody.

(1) 36 R. R. 246 (1 My. & K. 61). (2) 54 R. R. 232 (Cr. & Ph. 114).

1849.
Jan. 22.

KNIGHT BRUCE, V.-C.

[443]

COOPER *v.* THE SHROPSHIRE UNION RAILWAY AND CANAL COMPANY.

(13 Jurist, 443; S. C. 6 Rail. Cas. 136.)

Certain corporations were extinguished, and a new corporation formed of the old members and new members, and the debts of the extinguished corporations were made debts of the new corporation. The directors made a call for payment of one of the liabilities of one of the extinguished corporations, and the demurrer for want of equity of the Company to a bill by some of the shareholders against the directors and the Company, disputing the right of the directors so to appropriate the call, was allowed.

FROM the bill in this case, it appeared, that, in 1846, the Ellesmere and Chester Canal Company, then united with the Birmingham and Liverpool Canal Company, agreed to unite itself with the Montgomery and Shrewsbury Canal Company, for the purpose of converting those canals into railways. Late in the year, the whole was formed into the Shropshire Union Railway and Canal Company, the debts and liabilities of the several Canal Companies being constituted a charge on the whole undertaking, the estimated value of the canals and new property being subscribed, and the whole constituting the capital, and the purpose being to convert the canals into railways, and to make such new railways as might be requisite. The lines of railway contemplated were from Shrewsbury to Stafford, no part of the Shrewsbury Canal being used, though purchased; and from Crewe, on the Grand Junction Railway to Newton, in Montgomeryshire, which was formed chiefly by converting part of the Ellesmere and Chester Canal Railway, to Wolverhampton, to be formed by the conversion of the Birmingham and Liverpool Canal into a railway; and for these purposes three Acts of Parliament were obtained. Among the liabilities of the Canal Companies was a debt due from the Ellesmere and Chester Canal Company to the Commissioners for advancing Exchequer bills on loan for public works. A demand was made for payment of this debt before the Act was obtained, with interest, amounting to 300,000*l.*, and the money was raised by the personal bonds of canal shareholders as a security; and then the Royal Exchange Assurance Company advanced the money, and the Exchequer Loan Commissioners rebating interest to nearly 40,000*l.*, that sum was secured to the obligors in the bonds as a compensation for their risk. Before the Shropshire Union Act was passed, the Ellesmere and Chester Canal Company obtained an Act authorising them to raise money to pay off the debt when due. The Union Acts were passed

in August, 1846, and the capital authorised to be raised was 3,300,000*l.*, in 20*l.* shares, and an Act was passed for leasing the whole undertaking to the London and North-Western Railway Company. A call having been made for the purpose, among other things, of meeting an instalment on the debt due to the Royal Exchange Assurance Company, in January the bill was filed by certain shareholders, disputing the right of the directors to appropriate the money in this manner. To this bill the Company demurred for want of equity.

Bacon and *Speed*, for the demurrer, [cited *Foss* v. *Harbottle* (1), *Mozley* v. *Alston* (2), *The Exeter and Crediton Railway Company* v. *Buller* (3), and *Lord* v. *The Copper-Miners' Company* (4).]

Russell, *Malins*, and *Westoby*, for the bill, argued, that, as the directors had ample powers of raising money under the Union Act for the purpose of paying all liabilities of the concern, they had no right to apply the present existing capital to the purposes they endeavoured to do, to the detriment of some, and not all, of the shareholders. The general powers of raising capital were given for all the general purposes of the Union Act, and capital should be raised under these powers for this, among other the general purposes.

KNIGHT BRUCE, V.-C.:

The facts seem to me to be, that certain corporations were in existence; those corporations were extinguished, and a new corporation formed, consisting of new members, and of members of the extinguished corporations, all being made members of the new corporation; there appeared to be nothing more; and why were not those debts to be paid? Independently of the case of *Foss* v. *Harbottle*, before Sir James Wigram, V.-C.; *Mozley* v. *Alston*, before the present Lord Chancellor; *The Crediton Railway*, before Sir Lancelot Shadwell, V.-C., and the present Lord Chancellor; and *Lord* v. *The Copper-Miners' Company*, before the present Lord Chancellor, I should not have been prepared to decide, that all that in each and all of those cases has been decided is judicially sound. If not absolutely bound, however, by the doctrines judicially stated in them, I am at least justified, I conceive, in acting upon them.

(1) 62 R. R. 185 (2 Hare, 461).
(2) 65 R. R. 520 (1 Ph. 790).
(3) 73 R. R. 783 (16 L. J. Ch. 449).
(4) 78 R. R. 270 (2 Ph. 740).

COOPER v. THE SHROPSHIRE UNION RAILWAY AND CANAL COMPANY.

I think that I should be acting, at least, against some portion of each case, were I to overrule the present demurrer. I decline doing so not the less readily, because the inclination of my opinion is, that, were the authorities to which I have referred out of the way, I should decide the question of equity before me against the plaintiffs. Let the demurrer stand allowed, with costs.

PRIVY COUNCIL.

BAXTER'S PATENT (1).

1849.
June 21.

Lord BROUGHAM.

[593]

(13 Jurist, 593.)

The extension of a patent was opposed by the apprentices of the patentee, who alleged that they should not be able to get employment. It appearing, however, that they had been so instructed as to be able to get employment in another branch of the trade, no condition was imposed on the patentee on that account.

THIS was an application for the extension of the term of a patent granted in 1835, for an improved method of printing in colours, by a combination of copper-plate engraving and wood-cutting.

Shee and *Montague Smith* appeared for the petitioner, the patentee Baxter.

A former apprentice to the petitioner, Casgill Lighton, now appeared in person, and opposed the extension, on the ground that he and other apprentices had served their time with the petitioner under the expectation that the patent would expire in November next, and that they would then be able to exercise the trade themselves, and that they had not been properly taught any other trade by the patentee. In support of his case he examined two other apprentices, who, however, were now employed by other firms as wood-block engravers, wood-block engraving being part of the patentee's business, at wages of 34*s*. and 52*s*. respectively, which appeared to be high wages for workmen of their business.

LORD BROUGHAM delivered the judgment of the COURT:

Their Lordships having heard the statement of the case, and also taking into consideration the evidence on the other side, which went not so much to show that the patent ought not to be extended as to set up a defence on a special ground, their Lordships are clearly of opinion that there is great merit and utility in the patent; that the patentee has made nothing by it; that, without considering whether the amount of loss is to be set down as a loss to him as patentee, or as a speculator, in selling the products of his patent, at all events he has made nothing by it, and an extension must be given him. (His Lordship then proceeded to comment on the utility and beauty

(1) Present: Lord LANGDALE, M.R., Lord BROUGHAM, the Right Hon. T. PEMBERTON LEIGH, and the Right Hon. S. LUSHINGTON, LL.D., Judge of the Admiralty Court.

BAXTER'S PATENT.

of the invention.) The case set up against him does not traverse any of these positions; and it is peculiar, and the first case of the kind. Lighton, who has been heard in person, says, "All this may be very true, but I am in the position of apprentice to the patentee, and under my indentures. I, as well as others, was to be taught the art and mystery of wood engraving; instead of which Mr. Baxter has only given us moderate instruction in the general branch of wood engraving, and chiefly instructed us in his own art and mystery; that is, for two years out of seven he instructed us generally, and the other five in learning the patent portion; and we shall not be able to gain our livelihood, because we shall be prevented from exercising the only trade he has taught us." If that were founded in fact, we should have been compelled to put the petitioner under terms; but, in the first place, two years out of seven is considerable instruction; and it appears that it was so in fact, because otherwise the apprentices would be unable to gain their own living; and besides, they had further instruction, for they cannot work the patent portion without exercising the art of wood engraving. But here one of the witnesses swears that he has since been employed on delicate work; that he receives 34*s.* a week; and that he has had a reward of a book presented to him; and also that only one man besides the foreman receives more than himself, and that he had more than two others. Then another witness proves that he has been employed at 52*s.* a week, (I must observe that the nature of this work is such, that, from difference of abilities, one man will always earn much more than another), and that makes an end of the case; for they must have been fully instructed in order to earn such wages. We shall recommend her Majesty to extend the patent five years, without any condition at all.

CHANCERY.

BEASLEY *v.* WILKINSON.

1849.
July 13.

SHADWELL, V.-C.

[649]

(13 Jurist, 649.)

A devise, by a sole surviving devisee in trust, of all estates which at his decease might be vested in him as trustee, and which he could devise without breach of trust, to A. W., her heirs and assigns, upon the trusts affecting the same respectively: Held to pass the trust estates to the devisee, A. W.

BENJAMIN WILKINSON, being, at the date of his will, and at the time of his death, sole surviving devisee, upon trust for sale, under the will of John Brittain, of freehold and copyhold estates, devised all estates, lands, and hereditaments which at his decease might be vested in him as trustee, and which he could and might devise or dispose of by his will without breach of trust, unto and to the use of his wife, the defendant Ann Wilkinson, her heirs and assigns for ever, upon the trusts affecting the same premises respectively. The testator, Benjamin Wilkinson, left the defendant Edward Wilkinson his heir-at-law and customary heir. Various contracts had been entered into by Benjamin Wilkinson for the sale of portions of the trust estates, but had not been completed at the time of his death. The defendant Ann Wilkinson declined to act in execution of the trusts of Brittain's will, except under the direction of the Court. The present suit was accordingly instituted, and prayed a reference to the Master to approve of new trustees of Brittain's will, and that the unsold estates might be conveyed, surrendered, and assured by all proper parties, so as to vest the same in the new trustees, when appointed. The cause now came on for hearing.

Cairns, for the will, submitted, whether, having regard to the language of Benjamin Wilkinson's devise of the estates vested in him as trustee, the legal estate was now vested in his devisee, Ann Wilkinson, or in his heir (1).

Hughes appeared for the defendants.

The VICE-CHANCELLOR held, that the legal estate vested in the devisee.

(1) See *Cooke* v. *Crawford*, 60 R. R. 303 (13 Sim. 91); *Titley* v. *Wolstenholme*, 64 R. R. 106 (7 Beav. 425); *Mortimer* v. *Ireland*, 77 R. R. 74 (6 Hare, 196).

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(1) Full report reserved for decision on appeal.

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